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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 36

JOSEPH K. WILLING, RECEIVER OF COMMERCIAL NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA, PETITIONER,

vs.

ISRAEL BINENSTOCK, INDIVIDUALLY AND AS SURVIVING PARTNER OF THE PARTNERSHIP FIRM OF SWINGER AND BINENSTOCK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1937.

CERTIORARI GRANTED MAY 24, 1937.

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1937.

—9146-C

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ISRAEL BINENSTOCK, Ind. and as Surviving Partner of the Partnership Firm of Swinger and Binenstock and Bessie Swinger, Ind. and as Executrix of the Estate of Benjamin Swinger, Deceased,

vs.

JOSEPH K. WILLING, Receiver of the Commercial National Bank

Isadore Katz, Esq.
R. T. McCracken, Esq.
T. J. Minnick, Esq.

DOCKET ENTRIES

7/12/35. Bill of Complaint filed.
7/12/35. Subpœna entered, returnable August 1, 1935.
8/14/35. Subpœna returned, "on July 12, 1935 served" and filed.
8/28/35. Stipulation of counsel waiving time limit in which to file answer, etc., filed.
8/28/35. Answer by way of preliminary objections to Bill of Complaint filed.
2/17/36. Argued sur motion to dismiss bill.
3/23/36. Opinion Kirkpatrick, J. denying motion to dismiss Bill of Complaint filed.

[fol. 2]

4/11/36. Stipulation of counsel extending time in which to file answer, filed.
4/11/36. Answer filed.
6/ 9/36. Stipulation of counsel as to admission of certain paragraphs of Bill filed.
6/ 9/36. Final decree in favor of plaintiff with costs, filed.
6/15/36. Exceptions of Defendant and order of Court allowing same, filed.
6/15/36. Petition for appeal and Order of Court allowing Appeal, filed.
6/15/36. Assignments of error, filed.
6/15/36. Præcipe for transcript of Record sur Appeal, filed.
6/15/36. Citation allowed and issued.
6/15/36. Copy of Notice of Appeal filed.
6/23/36. Citation returned—service accepted and filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT—Filed July 12, 1935

To the Honorable the Judges of said Court:

Your orators complain and say:

1. On and prior to February 28th, 1933, the plaintiff, Israel Binenstock and Benjamin Swinger were engaged as partners under a verbal agreement in the wholesale grocery business in the City of Philadelphia, Pennsylvania, trading as Swinger & Binenstock. On February 28th, 1933, Benjamin Swinger died, and the said partnership business was continued by Israel Binenstock and Bessie Swinger, the widow of the said Benjamin Swinger.

2. The said Benjamin Swinger by his last will and testament appointed his wife, Bessie Swinger, to be the executrix of his estate and letters testamentary were issued to the said Bessie Swinger by the Register of Wills of Philadelphia County on April 26, 1933. The will of the said Benjamin Swinger is recorded in the office of the Register of Wills of Philadelphia County in Will Book No. 581 page 228. Under said will said Bessie Swinger is the sole beneficiary of the estate of the said Benjamin Swinger, deceased.

3. The Commercial National Bank is a national bank duly organized and existing under the National Banking Act of the United States of America, and on and prior to February 28, 1933, was engaged in the business of a national bank at Philadelphia, Pennsylvania.

4. On March 1, 1933, but as of the close of business on February 28, 1933, the Comptroller of the Currency of the [fol. 4] United States assumed control of the business and assets of the said Commercial National Bank. On March 14, 1933, the Comptroller of Currency appointed a conservator for the said Commercial National Bank, and on May 22, 1934, appointed John J. Sullivan receiver, and on June 22nd, 1934 appointed the defendant, Joseph K. Willing, as receiver of said Commercial National Bank.

5. On February 28th, 1933, and at all times, subsequent thereto, the said Commercial National Bank was and now is insolvent.

6. This is an action in equity arising under the laws of the United States.

7. Under date of January 9th, 1933, the said partnership firm of Swinger & Binenstock executed and delivered to the said Commercial National Bank its promissory note in the amount of $10,000.00 and under date of February 28th, 1933, executed and delivered to said Commercial National Bank its further promissory note in the amount of $10,000.00. Copies of the two promissory notes are hereto attached, made a part hereof and marked "Exhibit A" and "Exhibit B". Under date of May 1st, 1933, while the said Commercial National Bank was operating upon a restricted basis the said firm of Swinger and Binenstock as then constituted delivered its promissory note in the amount of $2,604.10 to replace a previous note given to guarantee certain notes of Satz Grocery Company. Said note of $2,604.10 has been paid in full but the complainants are informed the books of defendant show a balance of $37.98 due thereon which complainants admit and aver for the purposes of this case. A copy of said note is hereto attached, made a part [fol. 5] hereof, and marked "Exhibit C". Under date of January 25th, 1933, one, Luciano Cammarota executed and delivered to the partnership firm of Swinger & Binenstock his promissory note in the amount of $300 which note was endorsed and discounted at the said Commercial National Bank. Said note is overdue and has not been paid. A copy thereof is hereto attached, made a part hereof, and marked "Exhibit D". All of said notes were and now are held by said Commercial Bank and the respondent.

8. At the close of business on February 28th, 1933, the said Benjamin Swinger had upon deposit in the said Commercial National Bank the sum of $1,546.58, and the said Israel Binenstock had upon deposit in said bank the sum of $32,323.76. The said partnership firm of Swinger and Binenstock, as of the close of business on February 28th, 1933, had upon deposit in said Commercial National Bank the sum of $5,822.52.

9. The respondent has reduced the indebtedness of the partnership firm of Swinger & Binenstock to the said bank by allowing an off-set of the deposit standing in the name of Swinger & Binenstock in the amount of $5,822.52.

10. Notwithstanding the said Benjamin Swinger and Israel Binenstock had, on February 28th, 1933, on deposit at said Commercial National Bank the sums aforesaid greatly in excess of the indebtedness of said partnership firm of Swinger & Binenstock to said bank as aforesaid, the respondent has threatened to bring action against the complainants, or some of them, for the purpose of collecting the balance of said indebtedness.

[fol. 6] 11. Your orators, Bessie Swinger and Israel Binenstock have requested the respondent to allow as an offset in cancellation of the indebtedness of said partnership firm of Swinger & Binenstock to the Commercial National Bank so much of the deposit of Benjamin Swinger and of the deposit of Israel Binenstock at said bank as may be necessary to liquidate and cancel the same, but the respondent has always failed and refused to allow said set-off.

Wherefore your orators, being in need of equitable relief, pray—

1. That this Honorable Court order and direct the respondent to allow as an offset against the obligations of the said partnership firm of Swinger & Binenstock the amount of the deposit of the said Benjamin Swinger, now deceased, and so much of the deposit of Israel Binenstock as may be necessary to cancel the balance of said indebtedness.

2. That the indebtedness of the said bank to the complainants or any of them over and above the amount necessary to set off and cancel the liability on said notes be established.

3. For such other and further relief as the Court shall find and decree to be just and equitable in the premises.

(Sgd.) Isadore Katz, Robert T. McCracken, Attorneys for Complainant.

[fol. 7] *Duly sworn to by I. Binenstock and Bessie Swinger. Jurat omitted in printing.*

EXHIBIT "A" TO COMPLAINT

$10,000 (over). Philadelphia 1/9/1933.

Sixty days after date, we promise to pay to the order of Commercial National Bank Ten Thousand Dollars without defalcation for value received.

Payable at the Commercial National Bank, Philadelphia, Pa.

Swinger & Binenstock.

No. —. Due —.

Endorsement:

10,000

5,822.50 offset 2/21/35.

4,177.48

[fol. 8] EXHIBIT "B" TO COMPLAINT

$10,000. Philadelphia 2/28/33.

Sixty days after date we promise to pay to the order of Commercial National Bank Ten Thousand Dollars without defalcation for value received.

Payable at the Commercial National Bank, Philadelphia, Pa.

Swinger & Binenstock.

No. —. Due —.

EXHIBIT "C" TO COMPLAINT

$2604.10 (over). Philadelphia 5-1-1933.

30 days after date we promise to pay Twenty-six Hundred and four 10/100 Dollars without defalcation for Value received.

Payable at the Commercial National Bank, Philadelphia, Pa.

Swinger & Binenstock.

No. —. Due —.
Endorsement:
2604.10
500.00 a/c 5/3/33.

2104.10
500.00 a/c 6/2/33.

1604.10
500.00 a/c 7/3/33.

1104.10
500.00 a/c 8/1/33.

604.10
500.00 a/c 9/2/33.

104.10

[fol. 9] EXHIBIT "D" TO COMPLAINT

$300.00. Phila, Pa., Jan. 25, 1933.

Two months after date I promise to pay to the order of Swinger & Binenstock Three hundred 00/100 Dollars.

Payable at Commercial Nat'l Bank.

Without defalcation for value received.

Luciano Cammarota.

No. —. Due —.
Endorsement: Swinger & Binenstock.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO ANSWER—Filed August 28, 1935

It is stipulated and agreed by and between Isadore Katz, Esquire, and Robert T. McCracken, Esquire, attorneys for the complainants, and Thomas J. Minnick, Jr., Esquire, attorney for the respondent, in the above matter, that the attorneys for the complainants waive the time limitation of twenty days with which Answer was to be made to the Bill of Complaint filed in the above matter.

And it is further agreed that the Defendant's Answer by Way of Preliminary Objections to Plaintiffs' Bill of Complaint has been filed in due course.

(S.) Isadore Katz, Robert T. McCracken, Attorneys for the Complainants. (S.) Thomas J. Minnick, Jr., Attorney for the Respondent.

[fol. 10] IN UNITED STATES DISTRICT COURT

DEFENDANT'S ANSWER BY WAY OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S BILL OF COMPLAINT—Filed August 28, 1935

To the Honorable, the Judges of the said Court:

The defendant, by protestation, not confessing or acknowledging all, or any, of the matters or things in said Bill contained to be true, in such manner and form as the same are therein set forth and alleged, objects to the whole of said Bill, and for cause of objection, shows:

1. That the Bill of Complaint fails to allege any matter of equity entitling plaintiff to the relief prayed for therein.

2. That the prayer for a set off in this suit is void for want of mutuality.

3. That the plaintiff has a full, adequate, and complete remedy at law.

Wherefore, and for other good causes of objection appearing upon the face of the Bill aforesaid, this defendant objects thereto, and prays the judgment of this Honorable

Court whether he shall be compelled to make any answer to the said Bill, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

(Sgd.) Thomas J. Minnick, Jr., Attorney for Joseph K. Willing, Receiver of the Commercial National Bank.

[fol. 11] COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Joseph K. Willing, Receiver of the Commercial National Bank, being duly sworn according to law, deposes and says that he is the defendant above named, and that the foregoing is not interposed for delay.

(Sgd.) Joseph K. Willing.

Sworn to and subscribed before me this 23rd day of August A. D. 1936. (Sgd.) Agnes M. Pentland, Notary Public. My commission expires September 19, 1938. (Seal.)

IN UNITED STATES DISTRICT COURT

OPINION SUR MOTION TO DISMISS BILL IN EQUITY—Filed March 23, 1936

Before Kirkpatrick, J.

The Commercial National Bank was taken over by the Comptroller of the Currency as of February 28, 1933. On that day Swinger and Binenstock, partners, were jointly indebted to the bank upon promissory notes in an amount in excess of $20,000 (subsequently somewhat reduced by credits allowed). Binenstock had an individual deposit with the bank in excess of $30,000 and Swinger an individual deposit of about $1,500.

Binenstock as surviving partner and Mrs. Swinger as executrix of Swinger, deceased, have filed this bill in equity, setting out the above facts and also alleging that the Receiver of the Bank is about to bring action against [fol. 12] them for the balance of the joint indebtedness and that he has refused to allow the individual deposits of the two parties as a set-off against it. The prayer of the

bill is for a decree against the Receiver requiring that the individual deposit obligations be set off against the joint obligation of the partners upon notes, cancelling the liability and establishing the balances in their favor (or at least in favor of Binenstock). The respondent has moved to dismiss.

The law of the State of Pennsylvania if applicable would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. Stewart vs. Coulter, 12 S. & R. 252; Cochran vs. Cutter, 18 Pa. Sup. Ct. 282. See also Mintz vs. Tri-County Natural Gas Company, 259 Pa. 477.

The Pennsylvania rule should be followed by this court if the question seems to be "balanced with doubt". Burgess vs. Seligman, 107 U. S. 20; Sim vs. Edenborn, 242 U. S. 131; Trainor Company vs. Ætna Casualty & Surety Company, 290 U. S. 47.

The only question involved upon this motion is whether the decision of the Supreme Court in Gray vs. Rollo, 85 U. S. 629, in which the set-off was not allowed, rules the case. If it does, all doubt disappears and I may not follow the state law.

But I think that Gray vs. Rollo involves a basically different situation, that the distinguishing fact in that case was the point upon which the decision turned, and that it was so important a point that the Supreme Court took occasion to point out that, had it not been present and had the facts been as they are in the case now before me, the decision would have been otherwise.

In Gray vs. Rollo, the insolvent claimant was a fire insurance company. It held notes on which Moses Gray and [fol. 13] one Gaylord were jointly liable. It owed money upon a fire loss, not to Moses Gray individually, but to a partnership consisting of himself and his brother Franklin Gray. Moses Gray attempted by a bill in equity to compel the insurance company to set off the amount due on the policies to Gray Brothers against the joint obligation of himself and Gaylord. He alleged in his bill that his brother Franklin assented to and authorized the appropriation of half of the amount due on the policies to the extinguishment of his liability upon his joint note to Gaylord, but the

court apparently considered that this allegation was unimportant.

The conclusion of the Court was that "there is no rule of justice or equity which requires that Gray Brothers should be paid in preference to other creditors of the insurance company, out of the specific assets represented by the notes of Gray and Gaylord". The Court said in effect that the rule would have to work both ways and that, if the insurance company was being sued by Gray Brothers for the insurance money and it happened that Moses Gray instead of the insurance company was insolvent, it would be unjust to Moses Gray's partner or the partnership creditors of Gray Brothers to allow the set-off, because it would mean that the insurance company would be able to pay a part of its debt to the firm with Moses Gray's worthless paper. The opinion then goes on to distinguish an earlier decision, Tucker vs. Oxley, 5 Cranch 34, in which an equitable set-off had been allowed, and observed that "the reciprocal form of this rule (that is the rule of Tucker vs. Oxley) would have enabled the complainant to succeed in this case had he been the sole claimant of the money due for insurance".

Had the complainant in Gray vs. Rollo been the sole claimant of the money due for insurance, the situation [fol. 14] would have been exactly the same as that presented by the present bill because Binenstock is the sole claimant of his deposit and Swinger's executrix the sole claimant of his. In Roelker vs. Bromley-Shepard Company, Inc., 73 Fed. (2d) 618, the Circuit Court of Appeals for the First Circuit allowed a set-off in a case similar to the present, one except for the fact that the joint obligor who claimed the set-off may have been an accommodation party to the note (although the court said that the evidence to that effect should not have been received and did not affect the result). The Court expressly confirmed the right of set-off of an individual debt against a joint liability where the insolvency of the payee appears and an action is brought upon a joint note by his receiver or trustee in bankruptcy.

It is generally recognized that the insolvency of the obligee of a joint debt is a factor which may be considered in determining whether one of the joint obligors may in equity set off an individual claim. The Pennsylvania rule is clearly to the effect that the set-off claimed in this bill in

equity is allowable. There is no decision of the Supreme Court of the United States holding otherwise. On the contrary, the dictum in Gray vs. Rollo is to the effect that it would be.

I therefore conclude that the bill states a valid cause of action in equity and the motion to dismiss is denied.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO ANSWER—Filed April 11, 1936

And Now, to wit: 9 day of April, 1936, it is stipulated and agreed by and between Robert T. McCracken, Esq., attorney for the complainants, and Thomas J. Minnick, Jr., [fol. 15] Esq., attorney for the respondent, that the time within which the Answer to the Bill of Complaint is to be filed by rules of Court be extended to Friday, April 10, 1936; and that the said Answer, if filed on that day, will be properly filed irrespective of the rules of the court.

It is further agreed that this Stipulation shall be filed of record with full force and effect as if a rule to Show Cause had been granted and made absolute by the Court.

(S.) Robert T. McCracken, Attorney for the Complainants. (S.) Thomas J. Minnick, Jr., Attorney for the Respondent, by Joseph A. Grove, Jr.

IN UNITED STATES DISTRICT COURT

RESPONDENT'S ANSWER TO THE BILL OF COMPLAINT—Filed April 11, 1936

The respondent, reserving to himself all right of exception to the said Bill of Complaint, for answer thereto, saith:

1. The respondent avers that he has no personal knowledge of the facts alleged in paragraph 1 of the Complainant's Bill of Complaint, and, if material, to the issue, demands proof thereof.

2. The respondent avers that he has no personal knowledge of the facts alleged in paragraph 2 of the Complain-

ant's Bill of Complaint, and, if material to the issue demands proof thereof.

3. Admitted.

[fol. 16] 4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. It is admitted that Bessie Swinger and Israel Binenstock, complainants, have requested the respondent to allow as an off-set, in cancellation of the indebtedness of the said partnership firm of Swinger and Binenstock to the Commercial National Bank, so much of the deposit of Benjamin Swinger, and of the deposit of Israel Binenstock at said bank as may be necessary to liquidate and cancel same. It is further admitted that the respondent has always failed and refused to allow the set-off. The respondent avers that the said Commercial National Bank is in the control and possession of the Comptroller of the Currency of the United States, and that its liquidation is governed by the laws of the United States, so that respondent as receiver of the said Bank pursuant to said laws cannot allow the set-off of the individual claims of the complainants against the joint indebtedness of the said partnership.

All of which matters and things this respondent is ready and willing to aver, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed [fol. 17] with his reasonable costs and charges in this behalf most wrongfully sustained.

(S.) Thomas J. Minnick, Jr., Attorney for Joseph K. Willing, Receiver of the Commercial National Bank, Respondent.

IN UNITED STATES DISTRICT COURT

STIPULATION RE ADMISSIONS—Filed June 9, 1936

And Now, to wit, this 9th day of June, 1936, it is stipulated between counsel as follows:

The averments of paragraphs 1 and 2 of the Bill of Complaint filed herein shall, for the purposes of this case, be taken to be admitted by the defendant upon information and belief.

(S.) Robert T. McCracken, Attorney for Plaintiff.
(S.) Thomas J. Minnick, Jr., Attorney for Defendant, by Joseph A. C. Girone, Jr.

IN UNITED STATES DISTRICT COURT

FINAL DECREE—Filed June 9, 1936

And Now, to wit, this 9th day of June A. D. 1936, this case having come before the Court on Bill and Answer,

It is Ordered and Decreed as Follows:

[fol. 18] 1. Joseph K. Willing, Receiver of Commercial National Bank, is directed to allow as an off-set against the obligation of the partnership firm of Swinger and Binenstock to Commercial National Bank the amount of the deposit of the said firm the amount of the deposit of Benjamin Swinger, deceased, and so much of the deposit of Israel Binenstock in said bank as may be necessary to cancel said indebtedness.

2. The claim of Israel Binenstock against the assets of the said Commercial National Bank is hereby allowed in the amount of Nineteen Thousand Three Hundred Fifty-four and 88/100 Dollars, being the amount of the deposit of the said Israel Binenstock after making provision for the off-set directed in accordance with the first paragraph of this decree.

3. After allowing the said set-off said respondent is directed to endorse without recourse and deliver to Israel Binenstock the promissory note in the amount of Three Hundred Dollars made by Lucieno Cammarota, now held by the bank, and copied as "Exhibit D" as attached to the Bill of Complaint.

4. Respondent is further directed to cancel and return to the complainants the original of the three notes copied as "Exhibit A", "Exhibit B", and "Exhibit C", attached to the Bill of Complaint.

5. The respondent is further directed to pay the costs as a receivership expense.

(S.) W. H. Kirkpatrick, J.

[fol. 19] IN UNITED STATES DISTRICT COURT

EXCEPTION TO DECREE—Filed June 15, 1936

And Now, to wit: this 15th day of June, A. D. 1936, the respondent, Joseph K. Willing, Receiver of the Commercial National Bank, by his attorney, Thomas J. Minnick, Jr., Esq., excepts to the action of the court in making and entering an order and decree as follows:

And Now, to wit: this 9th day of June, A. D. 1936, this case having come before the Court on Bill and Answer,

It is Ordered and Decreed as Follows:

"1. Joseph K. Willing, Receiver of Commercial National Bank, is directed to allow as an off-set against the obligation of the partnership firm of Swinger and Binenstock to Commercial National Bank the amount of the deposit of the said firm, the amount of the deposit of Benjamin Swinger, deceased, and so much of the deposit of Israel Binenstock in said bank as may be necessary to cancel said indebtedness.

"2. The claim of Israel Binenstock against the assets of the said Commercial National Bank is hereby allowed in the amount of nineteen thousand three hundred fifty four and 88/100 Dollars, being the amount of the deposit of the said Israel Binenstock after making provision for the off-set directed in accordance with the first paragraph of this decree.

"3. After allowing the said set-off said respondent is directed to endorse without recourse and deliver to Israel Binenstock the promissory note in the amount of three hundred dollars made by Luciano Cammarota, now held by the bank, and copied as 'Exhibit D' as attached to the Bill of Complaint.

[fol. 20] "4. Respondent is further directed to cancel and return to the complainants the original of the three notes copied as 'Exhibit A' 'Exhibit B' and 'Exhibit C' attached to the Bill of Complaint.

"5. The respondent is further directed to pay the costs as a receivership expense."

Thomas J. Minnick, Jr., by Joseph A. C. Girone, Jr., Attorney for Joseph K. Willing, Receiver of Commercial National Bank, respondent.

Order Allowing Exception

And Now, to wit: this 15th day of June, A. D. 1936, the above Exception is allowed.

(S.) W. H. Kirkpatrick, Judge.

In United States District Court

Assignments of Error—Filed June 10, 1936

And Now, to wit: this 15th day of June, A. D. 1936, comes Joseph K. Willing, Receiver of the Commercial National Bank, defendant, and by his attorney, Thomas J. Minnick Jr., Esq., makes and files this, his Assignments of Error:

1. The learned Trial Judge erred in making the Final Decree.

2. The learned Trial Judge erred in directing the respondent to allow as an off-set against the obligation of the partnership firm of Swinger and Binenstock to Commer- [fol. 21] cial National Bank the amount of the deposit of the said firm, the amount of the deposit of Benjamin Swinger, deceased, and so much of the deposit of Israel Binenstock in said bank as may be necessary to cancel said indebtedness.

3. The learned Trial Judge erred in not dismissing the complainants' Bill of Complaint.

4. The learned Trial Judge erred in allowing the claim of Israel Binenstock against the assets of the said Commercial National Bank, being the amount of the deposit

of Israel Binenstock after making provision for the off-set directed.

5. The learned Trial Judge erred in directing that the respondent endorse without recourse and deliver to Israel Binenstock the promissory note in the amount of three hundred dollars ($300) made by Luciano Cammarota.

6. The learned Trial Judge erred in further directing the respondent to cancel and return to the complainants the original of the three notes copied as "Exhibit A" "Exhibit B" and "Exhibit C" attached to the Bill of complaint.

7. The learned Trial Judge erred in directing the respondent to pay the costs as a Receivership expense.

Thomas J. Minnick, Jr., by Joseph A. C. Girone, Jr.,
Attorney for Joseph K. Willing, Receiver of the
Commercial National Bank.

[fol. 22] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed June 15, 1936

And Now, to wit: this fifteenth day of June A. D. 1936, comes Joseph K. Willing, Receiver of the Commercial National Bank, feeling himself aggrieved by the final decree entered herein on June 9, 1936, in favor of the complainant and against the respondent, does hereby appear from said final decree, and from the whole and every part thereof, to the United States Circuit Court of Appeals for the Third Circuit, and prays that said appeal may be allowed, and does hereby present its assignments of error, and prays that said case may be certified to the said Circuit Court of Appeals for the Third Circuit.

Thomas J. Minnick, Jr., by Joseph A. C. Girone, Jr.,
Attorney for Joseph K. Willing, Receiver of the
Commercial National Bank.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 15, 1936

And Now, to wit: this 15th day of June A. D. 1936, it is ordered that the appeal be allowed, as prayed for, and same shall act as a supersedeas.

By the Court.

(S.) W. H. Kirkpatrick, Judge.

[fol. 23] IN UNITED STATES DISTRICT COURT

PRAECIPE FOR RECORD—Filed June 15, 1936

To the Clerk of the said Court:

Prepare Transcript of the record in the above entitled case for filing an appeal to the Circuit Court of Appeals, and include the following:

Docket Entries.
Bill of Complaint.
Stipulation of Counsel waiving time limit within which to file Answer, etc.
Answer by way of Preliminary Objections.
Opinion, Kirkpatrick, J., denying motion to dismiss Bill of Complaint.
Stipulation of Counsel extending time within which to file Answer to Bill of Complaint.
Answer to Bill of Complaint.
Stipulation of Counsel admitting paragraphs in Bill of Complaint.
Final Decree in favor of Complainant with costs.
Assignments of Error.
Petition for Appeal.
Order Allowing Petition for Appeal.
Certificate of Clerk.
and no others.

(S.) Joseph A. C. Girone, Jr., for Thomas J. Minnick, Jr., Attorney for Joseph K. Willing, Receiver of the Commercial National Bank.

[fol. 24] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

[Title omitted]

MINUTE ENTRY OF HEARING

And afterwards, to wit, the 14th day of October, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 2d day of February, 1937, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6183

JOSEPH K. WILLING, Receiver of the Commercial National Bank, Defendant-Appellant,

v.

ISRAEL BINENSTOCK, Individually, and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, and Bessie Swinger, Individually, and as Executrix of the Estate of Benjamin Swinger, Deceased, Plaintiffs-Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed February 2, 1937

Before Buffington, Davis and Thompson, Circuit Judges

Per Curiam:

This is an appeal from a decree of the District Court for the Eastern District of Pennsylvania. The appellant is the receiver of a national bank. The bank held promissory

notes in excess of $20,000 upon which the partners Swinger [fol. 27] and Binenstock were jointly liable. Binenstock had in his personal deposits at the bank a sum in excess of $30,000 and Swinger had on deposit approximately $1500. The receiver was about to sue the partners for the balance of the joint indebtedness upon the promissory notes and had indicated that he would refuse to allow the personal deposits to be set off against this indebtedness. Binenstock and Swinger's executrix filed a bill in equity praying a decree against the receiver directing that the individual deposits be set off against the joint liability on the notes. The District Court allowed the decree.

The opinion of the trial Judge (reported in —) discusses the question involved at length and, in our judgment, the court below was justified in following the Pennsylvania rule, for, as said in 290 U. S. 47, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt".

So regarding, the judgment is affirmed on the District Judge's opinion.

A true Copy. Teste:

——, ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 28] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6183

JOSEPH K. WILLING, Receiver of Commercial National Bank, Appellant,

vs.

ISRAEL BINENSTOCK, Individually and as Surviving Partner of the Partnership of Swinger and Binenstock, et al., Appellees

JUDGMENT—Filed February 2, 1937

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, February 2, 1937.

J. W. Thompson, Circuit Judge.

[File endorsement omitted.]

[fol. 29] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 30] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,474. U. S. Circuit Court of Appeals, Third Circuit. Term No. 36. Joseph K. Willing, Receiver of Commercial National Bank, Philadelphia, Pennsylvania, petitioner, vs. Israel Binenstock, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, et al. Petition for a writ of certiorari and exhibit thereto. Filed April 28, 1937. Term No. 36, O. T., 1937.

FILE COPY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. [redacted] 36

JOSEPH K. WILLING, RECEIVER OF COMMERCIAL NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA,

Petitioner,

vs.

ISRAEL BINENSTOCK, INDIVIDUALLY AND AS SURVIVING PARTNER OF THE PARTNERSHIP FIRM OF SWINGER AND BINENSTOCK, AND BESSIE SWINGER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF BENJAMIN SWINGER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No.

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania,

Petitioner,

vs.

ISRAEL BINENSTOCK, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, and BESSIE SWINGER, Individually and as Executrix of the Estate of Benjamin Swinger, Deceased,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Joseph K. Willing, as Receiver of the Commercial National Bank of Philadelphia, Pennsylvania, by direction of the Comptroller of the Currency of the

United States, respectfully submits this petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit (R. 26, 27) affirming the decree of the District Court of the United States for the Eastern District of Pennsylvania, in the above cause (R. 11-14).

Summary Statement of Matters Involved.

The opinion (R. 26, 27, reported in 88 F. (2d), at 474) and decree (R. 28) of the United States Circuit Court of Appeals for the Third Circuit affirms the opinion (R. 11-14, reported in 18 Fed. Supp., at 262) and final decree (R. 17, 18) of the District Court of the United States for the Eastern District of Pennsylvania. The essential facts are:

On March 1, 1933, but as of the close of business on February 28, 1933, the Commercial National Bank of Philadelphia, Pennsylvania, (referred to hereinafter as the bank) failed (R. 3, 17) whereupon the Comptroller of the Currency assumed control of its business and assets (R. 3, 4, 17). On February 28, 1933, Benjamin Swinger and Israel Binenstock, partners doing business under the firm name of Swinger and Binenstock (referred to hereinafter as the firm) were indebted to the said bank on the following obligations, previously incurred, which were among the assets of the said bank as of the date of its failure:

Two joint notes for $10,000 each, executed and delivered to the bank by the firm (R. 4, 7, 8, 16)	$20,000.00
One joint note for $2604.10 executed and delivered to the bank by the firm to guarantee certain indebtedness of Salz Grocery Company, which note had been reduced by payments made up to the date of the filing of this suit to a balance of (R. 4, 8, 16)	37.98

One note, payable March 25, 1933, executed and delivered by Luciano Cammarota, as maker, to the firm which note was subsequently endorsed by the firm and discounted by the bank (R. 5, 9, 16) in the principal sum of 300.00

Benjamin Swinger, one of the members of the firm, died on February 28, 1933 (R. 3, 17). Thereafter the partnership business of the said firm was conducted by Israel Binenstock, the surviving partner, and Bessie Swinger, the widow and the sole beneficiary and executrix of the estate of Benjamin Swinger, Deceased (R. 3, 17).

At the close of business on February 28, 1933, the following deposit accounts were among the liabilities of the said bank:

Swinger and Binenstock, $5,822.52; Benjamin Swinger, $1,546.58; Israel Binenstock, $32,323.76 (R. 5, 16).

Petitioner credited by way of set-off one of the firm notes aforesaid with the sum of $5,822.52, *i. e.*, the balance of the firm's deposit account as of February 28, 1933 (R. 5, 16).

Respondents (Israel Binenstock, individually and as surviving partner of the partnership firm of Swinger and Binenstock, and Bessie Swinger, individually and as executrix of the estate of Benjamin Swinger, deceased) filed a bill in equity on July 12, 1935 (R. 3-9) against petitioner, as receiver, for the allowance of a set-off of the firm obligations (both as maker and as endorser) to the bank against (1) the individual deposit account of Benjamin Swinger; and (2) against so much of the individual deposit account of Israel Binenstock as may be necessary to cancel the balance of said firm indebtedness.

The questions presented to the District Court were:

(1) Whether the *individual* deposit balances of the members of the firm can be properly set-off against the

primary *joint* obligation of the firm to the insolvent national bank;

(2) whether the *individual* deposit balances of the members of the partnership may be set-off against the *joint endorsement* liability of the firm to the insolvent national bank.

Petitioner contended that the laws of the United States governed the right of set-off as applied to insolvent national banks and that, under the Federal law, separate claims can not be set-off against joint (partnership) obligations due and owing to an insolvent national bank.

The District Court denied petitioner's motion to dismiss (R. 14) and after hearing on bill and answer decreed that petitioner set-off the firm obligations as prayed for by respondents (R. 18). The District Court also ordered petitioner to allow a claim in favor of respondent Binenstock in the amount of $19,354.88, being the amount of his deposit account after making provision for the set-off as directed (R. 18).

The Circuit Court of Appeals affirmed the decision of the District Court (R. 26-28). The basis of the decision of both courts below was that "Since the question is balanced with doubt," the law of the state of Pennsylvania should be followed by the Federal Court sitting in Pennsylvania "for the sake of harmony and to avoid confusion".

Petitioner contends that the questions here presented are not balanced with doubt, and, secondly, that whether or not such questions are balanced with doubt, they are to be controlled by the uniform Federal rule as applied to insolvent national banks (as distinguished from the variable and irreconcilable rules of the several states), all of which will be discussed more fully hereinafter.

Opinions of the Courts Below.

The opinion of the District Court for the Eastern District of Pennsylvania appears at pages 11 to 14, inclusive, of the Record, and is reported in 18 Fed. Supp. at 262. The opinion of the Circuit Court of Appeals for the Third Circuit affirming the decision of the District Court appears at pages 26 and 27 of the Record and is reported in 88 F. (2d) at 474.

Jurisdiction.

The Decree of the Circuit Court of Appeals for the Third Circuit, which is sought to be reviewed, was entered on February 2, 1937 (R. 28).

The jurisdiction of this Honorable Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Section 1 (U. S. C. Title 28, Section 347(a)).

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Third Circuit erred:

1. In allowing respondents (partners) to set-off their respective individual deposit accounts in the insolvent national bank against the joint primary obligations of the partnership to the bank.

2. In allowing respondents (partners) to set-off their respective individual deposit accounts in the insolvent national bank against the joint secondary liability (as indorsers) of the partnership to the bank.

3. In deciding that the right of individual members of a partnership to set-off their individual deposit accounts in an insolvent national bank against their joint obligations (both as makers and endorsers) to such bank is a question balanced with doubt.

4. In deciding that the law of set-off as applied to insolvent national banks is governed by the State rule.

5. In not dismissing respondents' bill in equity.

Statutes Involved.

Section 5236 U. S. R. S. (U. S. C. Title 12, Sec. 194) provides:

> "*Dividends on adjusted claims; distribution of assets.*—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Section 5242 U. S. R. S. (U. S. C. Title 12, Sec. 91) provides:

> "*Transfers by bank and other acts in contemplation of insolvency.*—All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one

creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

Purdon's Pa. Stat. Ann., Title 59, Sec. 37 (Uniform Partnership Act, Sec. 15) provides in part:

"*Nature of partner's liability.*—All partners are liable—

* * * * * * *

(b) Jointly, for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

Purdon's Pa. Stat. Ann., Title 59, Sec. 102 (Uniform Partnership Act, Sec. 40) provides in part:

"*Rules for distribution.*—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are—

I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank, in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners in respect of capital,

IV. Those owing to partners in respect of profits.

(c) The assets shall be applied, in order of their declaration in clause (a) of this paragraph, to the satisfaction of the liabilities."

Questions Presented and Reasons for Allowance of Writ of Certiorari.

The Circuit Court of Appeals, in affirming the decision of the District Court in this case, has decided (erroneously, we believe) three important questions, each of which will be discussed under the following subheadings:

1. *In deciding a question of set-off as applied to insolvent national banks, should the courts follow the established rules of the Federal courts, or should they follow the widely varying and conflicting rules of set-off prevailing in the several states?*

(a) *This precise question of Federal law* (which is constantly arising in the administration of the affairs of national banks in receivership) *has not been, but should be settled by this Court* in order that the Comptroller of the Currency, who is charged by law with supervision over the winding up of such banks, may apply with uniformity the correct rules concerning the allowance of set-off in insolvent national banks in the several states.

The law of *set-off as applied to national banks in receivership is a matter of substance, not a matter of procedure, Shannon* v. *Sutherland,* 74 F. (2d) 530; *Wisdom* v. *Guess Dry Cleaning Company,* 5 Fed. Supp. 762. See also *The Gloria,* 286 Fed. 188, 192, 193; *Champlin Refining Company* v. *Gasoline Products Company,* 29 F. (2d) 331, 338, affirmed *United States* v. *Thekla,* 266 U. S. 328. The reason underlying the doctrine that set-off as applied to insolvent national banks is a matter of substance, is that the determination of the question must be made in the light of the National Banking Act, *Bromley Shepard Co., Inc., et al.*

v. *Roelker*, 8 Fed. Supp. 215, affirmed 73 F. (2d) 618, cert. denied 294 U. S. 713.

The Conformity Act (Sec. 914, U. S. R. S., Title 28 U. S. C. Sec. 724) does not apply to this type of case for the reason stated in the foregoing paragraph, and for the additional reason that this case arises in equity and not at law.

The right of the respondents to participate in the distribution of the assets of the insolvent national bank is determined and fixed by the National Banking Act; consequently the question of whether that right may be enforced by way of set-off or otherwise must be determined by the Federal rule, cf., *Planters National Bank* v. *Wysong*, 177 N. C. 380, 99 S. E. 199, 12 A. L. R. 1412 (citing *Barnet* v. *Muncie National Bank*, 98 U. S. 555), cert. denied 250 U. S. 665 and error dismissed 251 U. S. 665.

Since *set-off*, insofar as it relates to insolvent national banks *is a question of general law, the Federal courts will exercise their own independent judgment in deciding the controversy. Gray* v. *Rollo*, 18 Wall. 629; *Swift* v. *Tyson*, 16 Pet. 1; *Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518. It is worthy of note that the respondents stated in their bill of complaint that

> "This is an action in equity arising under the laws of the United States" (R. 4).

(b) The decision of the Circuit Court of Appeals on this question is in *direct conflict with applicable principles established and consistently followed by this Court.* Mr. Justice Field, in expressing the views of this Court on the National Banking Act, said in *Cook County National Bank* v. *United States*, 107 U. S. 445, 448:

> "Everything essential to the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself, neither

> limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents nor their estates."

The National Banking Act is not affected by state statutes or decisions in conflict therewith, *Davis* v. *Elmira Savings Bank*, 161 U. S. 275; *Jennings* v. *United States Fidelity and Guaranty Co.* 294 U. S. 216.

Where mutuality in quality of right does not exist, this Court has denied set-off even though under the state statutes set-off might be available, *Dakin* v. *Bayly*, 290 U. S. 143, 90 A. L. R. 999. The Pennsylvania rule permitting set-off of non-mutual claims (*i. e.*, joint debt against several demands) was expressly rejected by this Court in *Gray* v. *Rollo, supra*, wherein Mr. Justice Bradley said at page 632:

> "But we do not regard the rule adopted in Pennsylvania as in accord with general rules of equity which govern cases of set-off."

The National Banking Act must be construed so as to operate uniformly throughout the states, *First National Bank of San Jose* v. *California*, 262 U. S. 366.

To permit the decision in this case to stand would result in confusion and uncertainty in attempting to apply the inconsistent rules of the several states.

(c) *The decision of the Circuit Court of Appeals on this question is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit* in *First National Bank* v. *Seldon*, 120 Fed. 212, wherein the court aptly said at page 215:

> "The moment the Niles bank went into the hands of the receiver, the federal law became the law of the distribution of its assets. In no other way could there be unity of administration, and a carrying out of the federal mandate of equality."

See also *McCandless* v. *Dyar* (D. C. S. D), 34 F. (2d) 989, wherein the court said:

> "The right to the allowance of such an offset in the case at bar must be determined in the light of the statutes of the United States controlling suspended banks in the hands of a receiver appointed by the Comptroller of the Currency, and especially the provisions of the United States statutes prohibiting preferences in the liquidation of national banks."

2. *Is a member of a partnership entitled to set-off his individual deposit account in an insolvent national bank against the joint primary obligations of the partnership to the bank?*

(a) *This precise question of Federal law*—frequently arising in the administration of the affairs of insolvent national banks—*has not been, but should be settled by this Court* in order that the Comptroller of the Currency, who is charged by law with supervision over the winding up of such banks, may apply with uniformity the correct rules concerning the allowance of set-off in such cases.

(b) The decision of the Circuit Court of Appeals on this question seems to be in conflict with the applicable principles consistently followed by this Court requiring: mutuality of *parties*—*Young* v. *Black*, 7 Cranch 564; *Beauregard* v. *Case*, 91 U. S. 134; mutuality of *right*—*Gray* v. *Rollo*, 18 Wall. 629; and mutuality in *quality of right*—*Sawyer* v. *Hoag*, 17 Wall. 610; *Scammon* v. *Kimball*, 92 U. S. 362; *Drexel* v. *Berney*, 122 U. S. 241.

In each of the above mentioned decisions, this Court laid down the fundamental doctrine that courts of equity, following the law, will not permit the set-off of a joint debt against a separate claim, or conversely of a separate debt against a joint claim, because such debts accrue in different rights, and consequently lack the required mutuality.

While insolvency is recognized as a ground for equitable intervention, yet courts of equity will not allow set-off *unless there are other equitable grounds—Scott* v. *Armstrong,* 146 U. S. 499; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.,* 152 U. S. 596; *a fortiori,* insolvency alone will not be permitted to destroy the statutory mandate (Secs. 5236 and 5242, U. S. R. S. quoted in full *supra,* pp. 7, 8) of the National Banking Act requiring equality of distribution—*Cook County National Bank* v. *United States,* 107 U. S. 445—nor to give a preference contrary to the statute—*Hanover National Bank* v. *Suddath,* 215 U. S. 122.

(c) *The decision of the Circuit Court of Appeals for the Third Circuit on this question is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit* in *Shannon* v. *Sutherland, supra,* wherein it was held that set-off as applied to insolvent national banks is a matter of substance, rather than procedure, and the obligor (who was not only jointly but also severally liable) was not permitted to set-off against his deposit account more than his proportionate share of his primary joint and several liability. The decision in the instant case is also in conflict with a previous decision of the same court in *Gray* v. *School District,* 67 F. (2d) 141, cert. denied *Hustead* v. *School District,* 291 U. S. 660, wherein the court said at pages 142-3:

> "The law will not permit a person to pay his debt with money of another."

We have found no decision by any Federal court permitting set-off of a joint partnership debt (as distinguished from several or joint and several) against a claim held by an individual partner, regardless of whether the partnership creditor was solvent or insolvent. The Circuit Court

of Appeals, in deciding this case, cited the decision of the Circuit Court of Appeals for the First Circuit in *Bromley Shepard Co.* v. *Roelker, supra,* which is clearly distinguishable from the instant case because (1) the debt to the bank was not a partnership debt; (2) Mrs. Shepard was an accommodation maker, and in equity the Bromley Shepard Company was the real and ultimate obligor. It is also significant to observe that while both joint makers in that case sought to have their respective deposit accounts set-off yet the Circuit Court of Appeals for the First Circuit permitted only the deposit account of the Bromley Shepard Company to be set off. To have permitted the set-off against Mrs. Shepard's account would have enabled her to recover from the company, thereby obtaining indirectly a preference over other depositors and creditors of the bank.

(d) That the debts of the partnership in the instant case are joint (as distinguished from several or joint and several) was correctly decided by the courts below and is clearly settled by the provisions of Title 59, Purdon's Pa. Stat. Ann. Sec. 37 (Sec. 15 of the Uniform Partnership Act, quoted in part, *supra*, p. 7). *The Circuit Court of Appeals has decided this question in a way probably untenable and in conflict with the weight of authority—Beauregard* v. *Case, supra; Gray* v. *Rollo, supra; Shannon* v. *Sutherland, supra,* and *In re Schults et al.* (D. C. N. Y.), 132 Fed. 573 (involving precisely the same question here under consideration). In general, the rule of set-off in bankruptcy is the rule in equity, *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, 166. See also *Williams* v. *Thomas* (D. C. Mich.), 6 F. Supp. 1011, at pp. 1014, 1015.

It is believed the proper doctrine on this question of general law was announced by the Indiana Court in the case

of *Wolcott* v. *Pierre,* 100 Ind. App. 16, 188 N. E. 596, 597, where the court said:

> "Appellee contends that he is not relying upon a statutory set-off under section 371, Burns' Ann. St. 1926, but seeks an equitable set-off 'because of the fact that appellant was insolvent, and therefore appellee and his partner had no way of enforcing their demand against appellant at law.' The courts of Indiana have long recognized the doctrine of equitable set-off; and, while the general rule is that only mutual debts existing in the same right are proper matters of set-off, still this rule has exceptions, one of them being that whenever it is necessary to prevent irremediable injustice, equity will allow the set-off although the debts are not mutual. Watson's Works Practice, sec. 715, p. 511. Appellee cites to this proposition two cases from Indiana, Eigenmann, et al. v. Clark, et al. (1898), 21 Ind. App. 129, 51 N. E. 725; Sefton v. Hargett, et al. (1888), 113 Ind. 592, 15 N. E. 513. The rule announced in both of these cases cited by appellee is to the effect that a court of equity will sometimes allow a set-off in the absence of strict mutuality, in order to prevent irremediable injustice.
>
> "Appellant concedes this rule, saying that it is 'too well settled for debate. But they do not decide what, in every instance, is irremediable injustice; they do not decide what nor where the equity would be if there were other creditors equally entitled to share in the distribution of the insolvent's estate.'
>
> "So, the question here is: Is the enforcement of the set-off herein necessary to prevent irremediable injustice?
>
> "Appellee bases right to this set-off upon the fact of the insolvency of the bank and the consent of his partner that the joint deposit may be used for this purpose, and that to disallow the set-off would work an irremediable injustice to appellee; and cites several cases from outside jurisdictions upon this proposition among them some from the state of Pennsyl-

vania, which has gone further in the allowing of set-offs than most of the other states in this country. In the case of Gray v. Rollo, (1873) 18 Wall. 629, 632, 21 L. Ed. 927, the Supreme Court of the United States, speaking of the Pennsylvania rule, said: 'In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off.' We do not think that the Pennsylvania rule, which allows set-offs without regard to mutuality, should be followed in this state."

(e) To permit the partnership debt to be retired by set-off against the individual deposit accounts of the members would enable the members to share in the partnership assets which constitute a trust fund dedicated to the payment of the partnership debts to partnership creditors, including the bank. See Title 59, Purdon's Pa. Stat. Ann., Sec. 102 (Sec. 40 of Uniform Partnership Act quoted in part, *supra*, pp. 7, 8). See also *Murrill* v. *Neill*, 8 How. 414, 427; *Froess* v. *Froess*, 284 Pa. 369, 131 A. 276. Respondent Binenstock, by using a large portion of his deposit account to extinguish the balance of the partnership debt would also be entitled to contribution from the estate of the deceased partner, clearly obtaining an advantage not enjoyed by other depositors of the bank. This unequal result, although indirectly made available, would violate the spirit if not the letter of Secs. 5236 and 5242, U. S. R. S. U. S. C. Title 12, Secs. 91 and 194 quoted in full *supra*, pp. 6, 7), requiring ratable distribution to all creditors with preferences to none, cf. *Jewett* v. *Martinsville Milling Co.* (C. C. A. 7), 76 F. (2d) 153.

3. *Can the members of a partnership maintain a suit against a national bank receiver to compel set-off of*

their respective individual deposit accounts in the bank against the joint secondary liability (as indorsers) of the partnership to the bank?

(a) This, like the second question, is an important question of Federal law which has not been, but should be settled by this Court for the same reason assigned to the second question, (*supra,* p. 11; par. (a))

(b) The decision of the Circuit Court of Appeals on this question seems to conflict with the decision of this Court in *Beauregard* v. *Case, supra,* wherein Mr. Justice Field said:

> "If there was any liability on the part of May for the indebtedness of the firm, except as partner, it was a liability as surety; and there can be no compensation, by operation of law, between the demand of the bank against him as surety and the indebtedness of the bank to him personally."

(c) The decision of the Circuit Court of Appeals on this question is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Shannon* v. *Sutherland, supra,* and in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Spurway* v. *Weintraub,* 66 F. (2d) 69, on the same matter. In the last mentioned case, the court held that in an indorser's suit against an insolvent national bank to compel set-off of his deposit against his liability as the indorser, the plaintiff has the burden of proving with reasonable certainty that the makers are insolvent, because if the set-off were allowed, the indorser could then collect from the makers and thereby obtain a greater percentage of his deposit than could other depositors. See also *Bryant* v. *Williams* (D. C. N. C.), 16 F. (2d) 159, wherein Circuit Judge Parker refused to permit an indorser who had discounted certain notes to set-off his deposit against the notes.

(d) The Circuit Court of Appeals has decided this important question in a way untenable and in conflict with the weight of authority. See *Bank of United States* v. *Braveman*, 259 N. Y. 65, 181 N. E. 50, 82 A. L. R. 658, and annotation at pp. 670 *et seq.*; *In re Garfunkel* (D. C. N. Y.), 8 F. (2d) 790; *Knaffle* v. *Knoxville Banking & Trust Co.*, 128 Tenn. 181, 159 S. W. 838, 50 L. R. A. (N. S.) 167 (cited with approval in *Shannon* v. *Sutherland, supra*), and *Williams* v. *Thomas, supra*, wherein an accommodation indorser who, with other accommodation indorsers, was jointly liable upon a note held by a receiver of a national bank, was denied the right to set-off such joint liability against his individual deposit in the bank even though the maker was insolvent.

WHEREFORE your petitioner respectfully prays:

(1) That this petition for writ of certiorari to review the decision of the Circuit Court of Appeals for the Third Circuit in the above case be granted;

(2) That the decision of the Circuit Court of Appeals for the Third Circuit in the above case be reversed; and

(3) For such other and further relief in the premises as to this Honorable Court may seem proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 36

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania,

Petitioner,

vs.

ISRAEL BINENSTOCK, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, and BESSIE SWINGER, Individually and as Executrix of the Estate of Benjamin Swinger, Deceased,

Respondents.

BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 36

JOSEPH K. WILLING, RECEIVER OF COMMERCIAL NATIONAL BANK, PHILADELPHIA, PENNSYLVANIA,

Petitioner,

vs.

ISRAEL BINENSTOCK, INDIVIDUALLY AND AS SURVIVING PARTNER OF THE PARTNERSHIP FIRM OF SWINGER AND BINENSTOCK, AND BESSIE SWINGER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF BENJAMIN SWINGER, DECEASED,

Respondents.

BRIEF OF PETITIONER.

Opinions Below.

The opinion of the United States District Court for the Eastern District of Pennsylvania (Kirkpatrick, D. J.) appears at pages 8 to 11, inclusive, of the Record, and is reported in 18 Fed. Supp. at 262.

The *per curiam* opinion of the United States Circuit Court of Appeals for the Third Circuit affirming the decision of the District Court appears at pages 18 and 19 of the Record and is reported in 88 F. (2d) at 474.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Third Circuit was entered on February 2, 1937 (R. 19). Petition for writ of certiorari was filed on April 28, 1937 (R. 20), under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (U. S. C. Title 28, Sec. 347(a)), and the order allowing the writ of certiorari was filed May 24, 1937 (R. 20).

Statement of the Case.

Respondents (Israel Binenstock, individually, and as surviving partner of the partnership firm of Swinger and Binenstock, and Bessie Swinger, individually, and as executrix of the Estate of Benjamin Swinger, deceased), filed a bill in equity on July 12, 1935, in the United States District Court for the Eastern District of Pennsylvania against petitioner, as receiver (R. 2-6), wherein the respondents prayed for a decree directing the petitioner to set off the indebtedness of the partnership to the bank (both as maker and as endorser) against (1) the individual deposit account of Benjamin Swinger; and (2) so much of the individual deposit account of Israel Binenstock as may be necessary to cancel the remainder of said firm indebtedness.

The essential and undisputed facts are:

On March 1, 1933, but as of the close of business on February 28, 1933, the Commercial National Bank of Philadelphia, Pennsylvania, (referred to hereinafter as the bank) failed (R. 2, 12) whereupon the Comptroller of the Currency assumed control of its business and assets (R. 2, 12). At the close of business on February 28, 1933, Benjamin Swinger and Israel Binenstock, partners doing business under the firm name of Swinger and Binenstock were indebted to the said bank on the following described obligations, previously incurred, which were among the assets of the said bank as of the date of its failure:

Two joint notes for $10,000 each, executed and delivered to the bank by the firm (R. 3, 5, 12)	$20,000.00
One joint note for $2,604.10 executed and delivered to the bank by the firm to guarantee certain indebtedness of Salz Grocery Company, which note had been reduced by payments made up to the date of the filing of this suit to a balance of (R. 3, 6, 12)	37.98
One note, payable March 25, 1933, executed and delivered by Luciano Cammarota, as maker, to the firm which note was subsequently endorsed by the firm and discounted by the bank (R. 3, 6, 12) in the principal sum of	300.00

Benjamin Swinger, one of the members of the firm, died on February 28, 1933 (R. 2, 13). Thereafter, the partnership business of the said firm was conducted by Israel Binenstock, the surviving partner, and Bessie Swinger, the widow and the sole beneficiary and executrix of the estate of Benjamin Swinger, deceased (R. 2, 13).

At the close of business on February 28, 1933, the following deposit accounts were among the liabilities of the said bank:

Swinger and Binenstock, $5,822.52; Benjamin Swinger, $1,546.58; Israel Binenstock, $32,323.76 (R. 3, 12).

Petitioner credited one of the firm notes aforesaid with the sum of $5,822.52 by way of set off, *i. e.*, the balance of the firm's deposit account as of February 28, 1933 (R. 3, 12).

The questions presented to the District Court were:

(1) Whether the *individual* deposit balances of the members of the firm can be properly set off against the *primary joint obligations* of the firm to the insolvent national bank; and (2) whether the *individual* deposit balances of the members of the partnership can be properly set off against the

joint endorsement liability of the firm to the insolvent national bank.

Petitioner contended that the rules of the Federal Courts govern the right of set-off as applied to insolvent national banks and that, under the Federal rules, separate deposit accounts of individual partners cannot be set off against joint obligations of the partnership due and owing to an insolvent national bank.

The District Court denied petitioner's motion to dismiss (R. 11) and after hearing on bill (R. 2-6), answer (R. 11, 12) and stipulation (R. 13), entered its decree ordering and directing that petitioner set off the primary obligations of the firm totalling the principal sum of $20,037.98 as well as the secondary obligation of the firm, as endorser, on the $300 Cammarota note against (1) the $5,822.52 deposit balance belonging to the firm; (2) the $1,546.58 deposit balance of Benjamin Swinger, deceased, and (3) $12,968.88 of the deposit balance of Israel Binenstock, thereby cancelling all indebtedness of the firm to the bank (R. 13, 14).

The District Court also ordered petitioner to allow a claim in favor of respondent Binenstock in the amount of $19,-354.88 being the remainder of his deposit account after making provision for the set-offs as directed (R. 13). Petitioner was further directed by the District Court to endorse without recourse and deliver to respondent Binenstock the aforesaid $300 Cammarota note (R. 13).

The Circuit Court of Appeals (in a per curiam opinion), affirmed the decision of the District Court (R. 18, 19). The basis of the decision of both courts below was that "Since the question is balanced with doubt," the law of the State of Pennsylvania should be followed by the Federal Court sitting in Pennsylvania "for the sake of harmony and to avoid confusion."

Petitioner contends: (1) that the questions here presented are not balanced with doubt; (2) that whether or not such

questions are balanced with doubt, they are to be controlled by the uniform Federal rules relating to set off which are applicable to insolvent national banks (as distinguished from the variable and irreconcilable rules of the several states); (3) that under the Federal rule separate claims of individual partners cannot be set off against partnership (joint) obligations to an insolvent national bank; (4) that under the Federal rule separate claims of individual partners cannot be set off against the joint endorsement liability of the partnership to an insolvent national bank.

Specification of Errors.

It is submitted that the Circuit Court of Appeals for the Third Circuit erred:

1. In allowing respondents (partners) to set off their respective individual deposit accounts in the insolvent national bank against the joint primary obligations of the partnership to the bank.
2. In allowing respondents (partners) to set off their respective individual deposit accounts in the insolvent national bank against the joint secondary liability (as endorsers) of the partnership to the bank.
3. In deciding that the right of individual members of a partnership to set off their individual deposit accounts in an insolvent national bank against their joint obligations (both as makers and endorsers) to such bank is a question balanced with doubt.
4. In deciding that the law of set-off as applied to insolvent national banks is governed by the State rule.
5. In not dismissing respondents' bill in equity.

Summary of Argument.

Set-off as applied to insolvent national banks is (1) a matter of substance, not procedure, and (2) a matter of general law.

The National Bank Act constitutes a complete code for winding up national banking associations and must be construed uniformly throughout the several States. Federal courts exercise an independent judgment on matters of set-off as applied to insolvent national banks and do not follow the varying rules of State courts as applied to other insolvents.

Primary joint obligations of a partnership due to an insolvent national bank cannot be set off against the separate demands of the individual partners because (1) the demands are not mutual; (2) the requirement of mutuality of parties is lacking; (3) there is no mutuality of right; (4) there is no mutuality in quality of right; (5) to permit the set-off would violate the illegal preference and ratable distribution provisions of the National Bank Act.

Insolvency of the bank, while a ground for equitable intervention is not a sufficient equity standing by itself to defeat the requirements of mutuality, because that equity favors not only the respondents but also every other depositor of the bank as well.

There are numerous equities favorable to all depositors and creditors which are superior to the single equity (aforementioned) of respondents as partners.

Individual deposit accounts of members of a partnership cannot be set off against the joint liability of the firm as endorser on the note of a third party, because

(1) Mutuality of obligation, mutuality of parties, mutuality of right and mutuality of quality of right are lacking.

(2) It would cause the individual partners to be preferred over other depositors and creditors of the bank in violation of the National Bank Act.

ARGUMENT.

I.

In Deciding Questions of Set-Off as Applied to Insolvent National Banks the Courts are Bound by the Established Rules of the Federal Courts and Should Not Follow the Widely Varying Irreconcilable and Conflicting Rules of Set-Off Prevailing in the Several States.

(a) *Preliminary Statement.*

The courts below held (erroneously we submit) and the respondents' chief contention is that the Pennsylvania rule should be followed and set-off allowed in this case "since the question seems to be balanced with doubt" (R. 9) and since "the dictum in *Gray* v. *Rollo*, 85 U. S., 629, is to the effect that it (*set-off*) would be (*allowable*)." (R. 11.) (Italics inserted.) It is respectfully submitted that the above conclusions are the fundamental errors from which flowed the inequitable results of and other errors in the decisions below.

We shall endeavor to show under the headings and subheadings which follow (1) that set-off as applied to insolvent national banks is a matter of substance, and (2) that all courts, Federal and State, are bound by the Federal rules governing set-off as a matter of substance, and as a matter of general law, and (3) that the rules of set-off applicable to the facts here presented have been settled by this and other Federal courts, and (4) that the applicable Federal rules and statutes prohibit the set-offs here sought by respondents.

We will then show that the facts involved in the cases relied upon by the respondents and the courts below are clearly distinguishable from the facts here presented.

(b) *Set-off as Applied to Insolvent National Banks is a Matter of Substance, Not Procedure, Whether at Law or in Equity.*

The right of set-off, non-existent at common law, was introduced and provided for by statute of 2 Geo. II, c. 24, Section 4, made permanent by the statute of 8 Geo. II, c. 24, Sections 4 and 5 which enacted that where mutual debts exist between the plaintiff and defendant, one debt may be set off against the other in order to avoid circuity of action and injustice.

United States v. *Eckford,* 6 Wall. 484, 488.

While set-off was introduced as a part of our procedural law it is rapidly becoming recognized generally as a requirement of substantive law. Circuit Judge Mack briefly reviewed the historical development of set-off in—

Kingdom of Norway v. *Federal Sugar Refining Company* (D. C. N. Y.), 286 Fed. 188, 192-3,

and permitted set-off to be pleaded in an action at law brought by the sovereign State of Norway (even though that kingdom was immune from suit without its consent), on the theory that set-off is a matter of substance rather than procedure.

In form the trial of collision cases in admiralty is upon libel and cross-libel but the real issue is whether the vessel libeled or the vessel cross-libeled is at fault. This rule applies even though the United States is the party against whom the cross-libel is filed.

Luckenbach Steamship Company v. *Norwegian Barque Thekla,* 266 U. S. 328, 340.

The United Sates Circuit Court of Appeals for the First Circuit held that the District Court erred in striking the defendants' plea of set-off for damages (even though not technically calculable in accordance with the Maine statute of set-off) in a suit brought in Maine by a New York

firm against an Oklahoma concern in the case of *Champlin Refining Company* v. *The Gasoline Products Company*, 29 F. (2d) 331, and in so doing recognized (at page 338) the general doctrine as stated by Circuit Judge Mack in *Kingdom of Norway* v. *Federal Sugar Refining Co.* (referred to by the Circuit Court of Appeals for the First Circuit as "The Gloria"), *supra*, that set-off "has now become really a requirement of substantive justice."

Little more than a decade after the National Bank Act became effective this Court in *Cook County National Bank* v. *United States*, 107 U. S. 445, reviewed and reversed the decree of the lower court overruling a demurrer filed by the defendant, a national bank receiver, to a bill filed by the Federal government wherein the latter relying upon the provisions of 3466 U. S. R. S. (quoted in appendix, page 44), (giving the United States a prior or preferential right over other creditors of insolvent persons and estates), asserted that it was entitled to payment of certain postmasters' accounts in the insolvent national bank out of either (1) the general assets of the receivership, or (2) the surplus proceeds of the sale of United States bonds which had been pledged by the bank to secure its circulating notes. While the government's bill of complaint in the *Cook County National Bank* case prayed for an accounting and that a decree be entered directing the disposition of the funds belonging to the bank in the control of the Treasury Department, the action was in substance a bill to enforce an alleged right of set-off which was controlled and governed by the general law of set-off and this Court so treated it in discussing the general law of set-off on pages 452-3.

Circuit Judge Parker said in *Shannon* v. *Sutherland* (C. C. A. 4), 74 F. (2d) 530, 531; "The matter here involved is not one of procedure but of substantive right." The questions presented in the *Shannon* case involved set-off

as applied to insolvent national banks and in many respects the facts in that case are closely analogous to the facts involved in the instant case as will be discussed hereinafter at pages 37 to 39, inc.

The United States Circuit Court of Appeals for the Eighth Circuit likewise followed the doctrine that set-off as applied to insolvent national banks is a matter of substance in—

First National Bank of Indianola v. *Malone*, 76 F. (2d) 251, 254.

See also

Wisdom v. *Guess Dry Cleaning Company* (D. C. Miss.), 5 Fed. Supp. 762 at 763;

Bromley-Shepard Company, Inc., et al. v. *Roelker* (D. C. Mass.), 8 Fed. Supp. 214, at 215, affirmed, *Roelker* v. *Bromley Shepard Co. Inc., et al*, 73 F. (2d) 618, cert. den. 294 U. S. 713.

(While the *Bromley-Shepard* decision is cited for the particular point discussed above, that case is distinguished from the case at bar in other respects, *infra*, pages 33-34.)

That set-off as applied to insolvent national banks is a matter of substantive law governed by the general law of set-off is clearly settled by the above authorities as well as by *Scott* v. *Armstrong*, 146 U. S. 499, which will be discussed, *infra*, at pages 35-37.

(c) *Every Matter (Including Set-off) Relating to the Distribution of Assets of an Insolvent National Bank Presents a Question Arising Under the Winding Up Provisions of the National Bank Act.*

In the opening statement of respondents' brief in opposition to petition for writ of certiorari, it is said at page 1:

> "The respondents do not contend that Congress, if it chooses, may not provide by statute when set-off shall be allowed in liquidating a national bank. The

respondents' position is that Congress has not done so."

Apparently, the courts below in the instant case have agreed with the views of respondent on this question. We believe that the applicable principles and authorities which will now be discussed are directly to the contrary.

While it is true that there is no Federal Statute specifically dealing with the subject of set-off as applied to insolvent national banks, yet the winding up provisions of the National Bank Act (U. S. C. Title 12, Sections 91, 192 and 194, quoted in appendix at pages 42-43) requiring ratable distribution to all creditors alike contemplates that such dividends will be made "from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank," as stated by Mr. Chief Justice Fuller in *Scott* v. *Armstrong, supra,* at page 510.

The real and ultimate question involved in this case is *what belongs to the bank and what belongs to the debtor.* It is the contention of petitioner as will be pointed out hereinafter, pages 17, 22, 23, that the assets of the partnership belong of right to the bank to the extent of the amount owing by the partnership to the bank and that such partnership assets do not belong of right to the partners.

A situation closely analogous to the instant case was presented to this Court in *Williams* v. *Heard,* 140 U. S. 529, wherein there was a dispute between the bankrupts and their assignee in bankruptcy as to whether or not a certain claim passed to the assignee. Mr. Justice Lamar in delivering the opinion of the court in the *Williams* case, said at page 536:

> "There is high authority in the state courts in support of the judgment of the court below. The same general question has arisen in New York, in Maryland, and in Maine; and in each instance the decision has been,

like the one we are reviewing, against the assignee. But as the question is one arising under the Bankruptcy Statute of the United States, we cannot rest our judgment upon these adjudications alone, however persuasive they may be."

Since petitioner as receiver has not only the right but also the duty to collect the partnership notes out of the partnership assets (as will be pointed out hereinafter, page 17), the allowance of the set-offs here under consideration would do violence to the express provisions of Section 5242 U. S. R. S., inasmuch as it would result in transferring to the respondents individually, (after the insolvency of the bank) partnership assets which are dedicated to the payment of the partnership indebtedness due and owing to the bank, to the prejudice of all other depositors and creditors of the receivership.

(d) *In Deciding Controversies Involving Set-off as Applied to Insolvent National Banks Federal Courts Will Not Follow the Varying Rules of State Courts (Applicable to Insolvents Generally) but Rather Will Exercise an Independent Judgment in Order That There May be Uniformity Throughout the Several States.*

Since set-off, in so far as it relates to insolvent national banks is a question of general law, the Federal courts will follow the rules of set-off as laid down by the Federal courts rather than the varying rules of set-off laid down by the several States as was done by this Court in deciding the controversy in *Gray* v. *Rollo*, 18 Wall. (85 U. S.) 629, at 632, wherein Mr. Justice Bradley expressly rejected the Pennsylvania rule of set-off with these words:

"In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do

not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off. We think the general rule is stated by Justice Story, in his treatise on Equity Jurisprudence, (Section 1437), where he says:

'Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity, which will justify even such an interposition. * * *' "

and of necessity, this rule must be strictly enforced in determining rights of creditors and liabilities of the bank arising after insolvency of the bank as so aptly stated in *First National Bank* v. *Selden* (C. C. A. 7), 120 Fed. 212, 215:

"In such a case the federal trust must be administered according to the mandate of federal law. The moment the Niles bank went into the hands of the receiver, the federal law became the law of the distribution of its assets. In no other way could there be unity of administration, and a carrying out of the federal mandate of equality."

and by District Judge Elliott in *McCandless* v. *Dyar* (D. C. S. D.), 34 F. (2d) 989, 991:

"The simple question presented here is: Has this defendant the right of set-off under the circumstances pleaded in this action, brought by the receiver upon his indebtedness to the bank? In the determination of this issue we can have little concern for decisions of courts in controversies in the various states growing out of the insolvency of mercantile or other establishments or individuals, allowing a surety who, after insolvency and assignment for benefit of creditors, has paid the debt of his principal to offset such payment against his indebtedness to the principal whose affairs were being administered by the assignee or other officer. The right to the allowance of such an offset in the case at bar must

be determined in the light of the statutes of the United States controlling suspended national banks in the hands of a receiver appointed by the Comptroller of the Currency, and especially the provisions of the United States statutes prohibiting preferences in the liquidation of national banks."

To the same effect is *Fiman* v. *State of South Dakota* (C. C. A. 8), 29 F. (2d) 776, 777, cert. denied 279 U. S. 841.

See also *Thomas* v. *Potter Title and Trust Company* (D. C. Pa.), 2 Fed. Supp. 12, (approved in *Dakin* v. *Bayly*, 290 U. S. 143, 90 A. L. R., 999), wherein District Judge McVicar after quoting from *Gray* v. *Rollo, supra* (the same quotation found herein at page 13), stated at p. 13:

> "These rulings impliedly recognize that the United States courts exercise an independent judgment on matters of set-off and do not follow the decisions of State courts."

The enforcement of the respondents' right of participation in the distribution whether by way of set-off or otherwise must be determined by the Federal rule, cf.

Planters National Bank v. *Wysong and Miles Co., et al.*, 177 N. C. 380, 99 S. E. 199, 12 A. L. R. 1412 (citing *Barnett* v. *Muncie National Bank*, 98 U. S. 555), cert. den. 250 U. S. 665, and error dismissed, 251 U. S. 665.

(e) *Not Governed by the Conformity Act.*

The conformity act (Section 914 U. S. R. S., Title 28, U. S. C., Section 724) does not apply to this type of case, because

(1) This is a suit in equity and as such is expressly excluded from the provisions of that act.
Scott v. *Armstrong, supra,* at page 512.

(2) The question of set-off here involved is one of substance, not procedure, as has been discussed, *supra,* pages 8 to 10.

(3) A substantive right or defense arising under a Federal statute cannot be lessened or destroyed by a local rule of practice.

Norfolk Southern Railroad Company v. *Ferebee,* 238 U. S. 269.

(4) This section does not require a Federal court to follow State procedure, where to do so will defeat the purpose or impair the effect of any Congressional statute.

United States v. *Beaty* (D. C. Va.), 198 Fed. 284, reversed on other grounds, 203 Fed. 620; case certified to Supreme Court, 211 Fed. 1019; writ of error dismissed, 232 U. S. 463.

II.

Joint Primary Obligations of a Partnership Due to an Insolvent National Bank Cannot be Set Off Against the Individual Deposit Accounts of the Several Partners.

(a) *General Rules of Set-Off Stated.*

The rule of law in set-off requires mutuality of parties, *Beauregard* v. *Case,* 91 U. S. 134; mutuality of right, *Gray* v. *Rollo, supra,* and mutuality in quality of right, *Sawyer* v. *Hoag,* 17 Wall. 610; *Scammon v. Kimball, Assignee,* 92, U. S. 362; *Dakin* v. *Bayly, supra.*

It is the well settled Federal rule *applicable both at law and in equity* that a joint debt cannot be set off against a separate claim or demand and that a separate claim or demand cannot be set off against a joint debt for the reason that the claims accrue or exist in different rights or capacities which fact defeats the mutuality required for the allowance of set-off. This well settled doctrine was clearly stated by way of *dictum* and analogy in *Drexel* v. *Berney,* 122 U. S. 241, at 253, 4, thusly:

"The rule regulating the right of set-off is the same both at law and in equity, and yet there are many

cases where set-offs not permissible at law may be enforced in equity. As was said by Mr. Justice Story in Greene *v.* Darling, 5 Mason, 201, 209: 'Now, the general rule in equity is, like that at law, that there can be no set-off of joint debts against separate debts, unless some new equity justify it. Such an equity may arise under circumstances of fraud; or where the party seeking relief is only a surety for a debt really separate; or where there are a series of transactions in which joint credit is given with reference to the separate debt.' And at page 212: 'Since the statutes of set-off of mutual debts and credits, courts of equity have generally followed the course adopted in the construction of the statutes by courts of law; and have applied the doctrine to equitable debts; they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to.'''

We shall now show that mutuality is lacking in several respects between the debt of the partnership to the bank on the one hand and the demands of the individual members of the partnership against the bank on the other hand, and then demonstrate that there are no equities in favor of respondents which justify the relief sought by them.

(b) *The Debt of the Partnership to the Bank and the Individual Deposit Accounts of the Respondents are lacking in Mutuality, Therefore are not Subject to Set-off.*

The promissory notes evidencing the indebtedness of the firm to the bank (R. 5, 6) by their express terms constituted joint obligations (as distinguished from several or joint and several), *Groves* v. *Sentell*, 153 U.S. 465. Furthermore, the joint character of the indebtedness is fixed by Title 59, Purdon's Pa. Stat. Ann., Section 37 (Section 15 of the Uniform Partnership Act) which reads in part as follows:

"Nature of partner's liability.—All partners are liable • • • (b) Jointly, for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

The bill of complaint in this case discloses on its face that Benjamin Swinger, one of the members of the firm, died on February 28, 1933, and that the bank did not suspend operations until March 1, 1933. It is clear, therefore, that dissolution of the partnership took place as a matter of law (common law as well as statutory) immediately upon the death of Mr. Swinger.

Froess v. *Froess* 284 Pa. 369, 131 Atl. 276.

Upon dissolution, the partnership assets must be distributed in the manner provided by Title 59, Purdon's Pa. Stat. Ann., Section 102 (Section 40 of the Uniform Partnership Act), quoted in part in appendix pages 43, 44, *i. e.*, the partnership assets must be distributed first to partnership creditors before any distribution is made to the partners. Therefore, on February 28, 1933, when the firm having become dissolved as a matter of law, the partnership assets should have been used to pay the debt of the partnership to the bank. The interest of each partner in and to such partnership assets was subordinate to the interest, rights and equities of the creditors of the partnership.

Stated in another way, the partnership assets constitute a trust fund for the benefit of the firm creditors (including the Commercial National Bank of Philadelphia), *Murrill* v. *Neill*, 8 How. 414, 427 (citing Story on Partnership, p. 376).

The deposit accounts of the respondents as individuals are clearly and indisputably separate demands against the insolvent bank. We therefore have joint obligations of the partnership on the one hand and separate demands of the respondents as individuals on the other hand which cannot

be set off under the general rule requiring mutuality (see discussion *supra*, pages 15, 16). Furthermore, to permit the set-off would violate the requirement of mutuality indicated by *Cook County National Bank* v. *United States, supra; Thomas* v. *Potter Title and Trust Company, supra.* Petitioner is entitled to collect the partnership notes out of partnership assets rather than respondents being entitled to collect their deposit balances (indirectly) out of partnership assets.

Conceding for the purposes of discussion (but without admitting) that petitioner could have sued or can now maintain a suit against and recover from each or both of the respondents individually on the partnership notes, the required mutuality would not thus be established because the right to sue or the liability to be sued does not in and of itself create the right of set-off. The doctrine just stated was applied by this Court in *Dakin* v. *Bayly, supra,* wherein the Clearwater bank was denied the right to set-off demands held by it as agent against its debt to the receiver of the St. Petersburg bank even though the Clearwater bank could have brought suit against the St. Petersburg bank on the collection items. See also *Southern Railway Co.* v. *Elliott et al.,* (C. C. A. 4), 86 F. (2d) 294, wherein the railway company was denied the right to set off its deposit account against its liability on certain invoices which were pledged to secure the indebtedness of the lumber company to the insolvent bank. The receivers of the bank could have sued the railway company and the railway company could have paid its indebtedness on the invoices, thereby discharging the debt of the lumber company, nevertheless the set-off was denied.

(c) *Equity Will Not Permit Set-Off of Non-Mutual Debts Unless There Are Equitable Grounds Other Than Insolvency.*

It is settled law that insolvency is a recognized ground for equitable interference to the extent of inquiring into the

facts, looking to the substance, not the form, and to decide what, in each instance, is equitable and just with due regard to all parties in interest including the interests of third persons.

Gray v. *School District*, 67 F. (2d) 141, cert. den. *Hustead* v. *School District*, 291 U. S. 660;
Sawyer v. *Hoag*, *supra*.

In order that petitioner's contention may be made clear, it is freely admitted that death or insolvency of either party will not defeat the right of set-off where mutuality exists, *Yardley* v. *Clothier* (C. C. A. 3), 51 Fed. 506, 507; 17 L. R. A. 462; *Scott* v. *Armstrong*, *supra*. There is, however, a vast difference between insolvency defeating the right of set-off on the one hand and insolvency creating a right to set-off non-mutual demands on the other hand.

The court below (District) recognized that *insolvency* of a bank is *only one factor* to be considered in a situation of this kind (R. 10) but chose to follow the Pennsylvania rule which, it is said, grants set-off of non-mutual claims as a matter of right upon the insolvency of the payee, without the showing of any other equitable ground.

Federal courts of equity, upon inquiry into the facts, have allowed set-off (where there were substantial superior equities favoring the parties claiming the right to set-off) in the following types of cases:

(a) In favor of the surety where the principal debtor is insolvent. *Fidelity and Deposit Company* v. *Duke* (C. C. A. 9), 293 Fed. 661.

(b) In favor of the real debtor whether his or its name appears on the face or the back of the note and regardless of the provisions of the N. I. L. *Scott* v. *Armstrong*, *supra*. *Barrington* v. *Maner*, 54 F. (2d) 917. See also *Building and Engineering Company* v. *Northern Bank* (N. Y.), 99 N. E. 1044. Compare: *Knaffle* v. *Knoxville Banking & Trust Co.* (Tenn.), 159 S. W. 838, 50 L. R. A. (N. S.) 167.

(c) To the real owner of the claim. *Gray* v. *School District, supra.*

(d) To the party who will ultimately be required to pay the indebtedness. *Shannon* v. *Sutherland, supra; Scott* v. *Armstrong, supra.*

(e) Where the doctrine of mutual credits applies. *Roelker* v. *Bromley Shepard Company, supra; Scott* v. *Armstrong, supra.*

(f) Several debt (not joint) against several demand, *Beauregard* v. *Case, supra; Obiter in Richmond* v. *Litteer* (C. C. A. 8), 1 F. (2d) 311, 312.

(g) Where there was an agreement either express or implied to set off. *Millett* v. *Omaha National Bank* (C. C. A. 8), 30 F. (2d) 665; *Bromfield* v. *Trinidad National Investment Company* (C. C. A. 10), 36 F. (2d) 646; *Scott* v. *Armstrong, supra.*

On the other hand we find no Federal decision where set-off was allowed of a joint partnership debt (the firm as well as the member being solvent) against separate deposits of the individual partners in an insolvent national bank, nor have we found any Federal decision permitting set-off of non-mutual demands on the ground of insolvency of the bank alone.

The dearth of judicial decisions on the question of the right of an individual partner to set-off his deposit claim against the joint debt of the partnership to a closed national bank suggests that the many claimants (in the innumerable similar situations which have arisen in the three-quarters of a century since the enactment of the National Bank Act) have concluded that the position of the Comptroller of the Currency denying such set-offs in such cases is correct.

A situation closely analogous to the case here presented arose in *Jewett* v. *Martinsville Milling Company,* 76 F. (2d) 153 (1935), wherein a corporation sought by bill in equity to set off its deposit against the note of its president,

Schnaiter, to an insolvent national bank. Schnaiter owned practically all of the stock in the corporation. The Circuit Court of Appeals for the Seventh Circuit reversed the court below by denying the set-off, despite the fact that the loan was admittedly procured by Schnaiter for the accommodation and benefit of his corporation and despite the fact that Schnaiter owned practically all of the stock in the corporation. The Court said at page 155:

> "Set-off is at times allowed where to deny it would entail inequity and hardship which its allowance would avert. But no such situation is here presented. The only inequity which might here suggest itself would be toward the other depositors of this broken bank in case its distributable assets were reduced by applying the milling company's deposit account in discharge of the presumably collectible Schnaiter note.
>
> This record does not in our judgment disclose any of those elements which would justify the set-off."

See also:

Wolcott v. *Pierre,* 100 Ind. App. 16, 188 N. E. 596, 597,

wherein set-off of a partnership account against the debt of one of its partners to an insolvent national bank was denied, and *where the court held that insolvency of the bank was not an equity justifying departure from the rule prohibiting set-off of a joint account against a single debt.*

While the following outline is to some extent a repetition of other material in this brief we deem it advisable to point out with particularity that there are no superior equities in favor of respondents, but on the contrary the equities of other depositors and creditors of the bank are greater in number as well as superior in quality to the equities of respondents.

This is not a controversy between the individual partners on the one hand and the bank on the other, but is in sub-

stance an action brought by the two individuals as creditors of the bank against the other depositors and creditors of the bank, *Texas and Pacific Railway Company* v. *Pottorff*, 291 U. S. 245; *Jewett* v. *Martinsville Milling Company*, *supra*. Therefore, the rights, not only of the bank but also of the other depositors and creditors must be taken into consideration. That the receiver represents the creditors of the bank is too well settled to admit any question or doubt, *Kennedy* v. *Gibson*, 8 Wall. 498; *Case* v. *Terrell*, 11 Wall. 199.

In many cases the receiver can institute suits or assert defenses which would not be available to the bank itself, *Texas and Pacific Railway Company* v. *Pottorff*, *supra*; *McCandless* v. *Furlaud*, 296 U. S. 140, rehearing denied, 296 U. S. 664.

The equities favorable to the other creditors and depositors of the bank are summarized as follows:

(a) Equity, *following the law*, will not permit set-off of separate demands against joint obligations, unless some other equity intervene which justifies granting relief beyond the rules of law, *Scott* v. *Armstrong*, *supra*.

(b) The partnership assets were dedicated to the payment of indebtedness of the firm to the bank, and this was particularly so after dissolution caused by the death of Mr. Swinger. See discussion, *supra*, page 17. The interest and equity of the individual partners in and to the partnership assets was subordinate and inferior to the equities and rights of depositors of the bank who were (in equity) the owners of the partnership notes.

(c) The executrix of the estate of Benjamin Swinger, deceased, if she were permitted to set off the deposit account of the estate ($1,546.48) against the firm indebtedness would indirectly realize 100% of the deposit balance belong-

ing to the estate, by succeeding to the equity and interest of the receivership (depositors and creditors of the bank as distinguished from the bank itself) in the assets of the firm.

(d) By permitting Binenstock to set off $12,968.88 of his deposit account to the extinguishment of the balance of the firm indebtedness (1) his equity and interest in the partnership assets would be increased at the expense of the other depositors and creditors of the bank; (2) the partnership would be permitted to pay its debt with money of another in violation of the rule stated in *Gray* v. *School District, supra,* at pages 142, 143; (3) Binenstock would become entitled to contribution from the estate of Benjamin Swinger, deceased, in violation of the rule laid down in *Shannon* v. *Sutherland, supra,* and implied in *Williams* v. *Thomas,* (D. C. Mich.), 6 Fed. Supp. 1011.

(e) Indirectly, both partners would obtain full payment of their deposit accounts (plus interest at the legal rate until the notes are collected in full) to the extent of the amounts set off, contrary to the express provisions of the National Bank Act (U. S. C., Title 12, Sections 91 and 194) requiring ratable distribution (and none other) to all depositors alike and prohibiting preference of one creditor over others after insolvency of the bank. Cf. *Hanover National Bank* v. *Suddath,* 215 U. S. 122.

(f) Applying the conclusions reached by Circuit Judge Alschuler in *Jewett* v. *Martinsville Milling Company, supra* (see quotation, *supra,* at page 21); and by way of paraphrase,

> Set-off is at times allowed where to deny it would entail inequity and hardship which its allowance would avert. But no such situation is here presented. The only inequity which might here suggest itself would be toward the other depositors of this broken bank in case

> its distributable assets were reduced by applying the individual deposit accounts of Binenstock and Swinger in discharge of the partnership and the Cammarota notes which are presumably collectible. This record does not disclose any of those elements which would justify the set-offs.

The only equity in favor of the respondents (referred to in their brief in opposition to petition for writ of certiorari, pages 4, 5), is the fact that the insolvency of the bank forecloses the possibility of receiving 100% payment of their separate deposit accounts. **That unfortunate condition, however, affects not only the respondents but all other depositors and creditors of the bank as well. Consequently, this equity in favor of the respondents is not superior, but rather is only equal, to the same equity in favor of all depositors of the bank. Between equal equities the law must prevail.**

The many equities in favor of the other depositors far outnumber the single equity favorable to the respondents (which is equal rather than superior to the equity of other depositors) as has been pointed out. When all equities are weighed, it is clear that the balance is *against* the set-off and that the equities of other depositors are greatly superior in quality to those of respondents. See 44 Y. L. J., 171 (criticising *Bryant Brothers* v. *Wilson,* 253 Ky. 578, 69 S. W. (2d) 1020, wherein the Kentucky court permitted set-off in a case similar to the instant suit), the author of the note concluding, at page 173, by saying:

> "Since it is commonly accepted that in order to claim equitable set-off the substantial justice in its favor must be superior to the equitable arguments in opposition, Waterman, Set-Off, Section 439, it would seem that even on equitable grounds the instant decision is questionable."

III.

The Endorsement Liability of the Partnership Cannot be Set Off Against the Individual Deposit Accounts of the Respondents.

No distinction is drawn, either by the respondents or by the courts below, between the primary obligation on the notes executed by the firm as maker, and the secondary liability of the firm as endorser on the Cammarota note. This distinction was called to the attention of both courts and in particular to the Circuit Court of Appeals in the Assignment of Errors (R. 16) and was discussed in the briefs filed in that court.

The mere fact that the Cammarota note was not paid at maturity (and incidentally this note matured after the bank closed), creates no presumption of insolvency of the maker.

Spurway v. *Weintraub*, 66 F. (2d) 69.

It is well settled that the endorser is not entitled to set-off unless the maker or the party primarily liable is insolvent and unable to pay.

Williams v. *Rose*, 218 Fed. 898;
Bryant v. *Williams* (D. C. N. C.), 16 F. (2d) 159.

To the same effect see:

Bank of United States v. *Braveman*, 259 N. Y. 65, 181 N. E. 50;
In re Garfunkel, 8 F. (2d) 790.

See also:

Knaffle v. *Knoxville Banking & Trust Company, supra* (cited with approval by Circuit Judge Parker in *Shannon* v. *Sutherland, supra*).

wherein the surety was denied set-off even though jointly and severally liable with the principal.

District Judge Raymond in his comparatively recent decision in

Williams v. *Thomas, supra.*

dismissed, for want of equity, the bill filed by one of seven endorsers on a note executed (as maker) by a corporation which became insolvent. The bill sought to compel the receiver of an insolvent national bank to set off as against the plaintiff's deposit, the amount necessary to discharge the note of the corporation. In denying the set off the court pointed out that

(1) the plaintiff was jointly (not severally nor jointly and severally) liable as endorser.

(2) the rule is well settled that joint debts may not be set off against separate demands.

(3) that plaintiff's right of contribution from other endorsers in case he pays the note would make him whole,

and inferred that

(4) Insolvency of the bank was not a sufficient equity to justify a departure from the strict rule of mutuality.

(5) Insolvency of the bank plus the insolvency of the maker were not sufficient equities to justify a departure from the strict rule of mutuality.

By the same reasoning, if it had been sought to have the firm's deposit account set off against its endorsement liability on the Cammarota note, such relief could not properly have been allowed because the firm could thus, by indirection, obtain 100% of its deposit, plus interest, from Cammarota; *a fortiori* the prayers of the complainants to set off their individual deposit accounts against the endorsement liability of the firm should be denied.

IV.

Authorities Cited by Courts Below and Respondents, Distinguished.

(a) *On Question of Whether Federal Court or State Court Rule Should be Followed.*

The first decision cited by the District Court for the proposition that the Pennsylvania rule should be followed in this case is—

Burgess v. *Seligman*, 107 U. S. 20,

which involved the construction of a Missouri statute fixing the liability of shareholders of corporations organized under the laws of that State and even in that case it was held that the Federal courts having independent jurisdiction coordinate with that of the State courts are bound to exercise their own judgment as to the meaning of State laws.

The next case cited by the lower court is—

Sim v. *Edenborn*, 242 U. S. 131,

wherein the plaintiff *relying upon the laws of New York* sought to rescind a contract for fraud and to recover payments made thereunder. Mr. Justice McReynolds in delivering the opinion of the Court said, at page 135:

> "This court has many times considered how far Federal tribunals, when undertaking to *enforce laws of the States*, should follow opinions of their courts. The authorities were reviewed, and rule announced in Burgess *v.* Seligman, 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence the former exercise their own judgment, 'But even in such cases, *for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts* if the question seems to them balanced with doubt.'" (Italics ours.)

The last case cited by the District Court and the only one cited by the Circuit Court of Appeals is—

Traimor Company v. *Ætna Casualty Company,* 290 U. S. 47,

which dealt with a question of damages recoverable on a building completion bond. The Federal court followed the State rule not only "for the sake of harmony and to avoid confusion" but also "because the Pennsylvania decisions—are clearly right."

Respondents contend (pages 15 to 25, inclusive, of their brief in opposition to petition for writ of certiorari) that Title 28 U. S. C., Sec. 725 (721 U. S. R. S., which was derived from the Act of September 24, 1789, c. 20, Sec. 34, 1 Stat. 92), which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

was too narrowly construed in *Swift* v. *Tyson,* 16 Pet. 1, and place considerable stress (p. 18 to 21 of their brief in opposition to petition for writ of certiorari) on the dissenting opinion in *Black and White Taxicab and Transfer Company* v. *Brown and Yellow Taxicab and Transfer Company,* 276 U. S. 518, wherein Mr. Justice Holmes suggested that the rule laid down in *Swift* v. *Tyson, supra,* be limited and not allowed to spread into new fields of common law.

There is nothing in either the majority or the minority opinion in the *Black and White Taxicab* case nor in any of the cases cited by the courts below which could possibly be construed to mean that the Federal courts are bound by the State rules in deciding a question involving the rights of creditors of an insolvent national banking association which rights are fixed by the National Bank Act.

The provisions of Section 721, U. S. R. S., have no bearing on nor application to the case at bar, because—

(1) That section relates in express terms only "to trials at common law" which phrase does not include suits in equity, *Kirby* v. *Lake Shore and Michigan Railroad*, 120 U. S. 130, 137; 138.

(2) The National Bank Act has spoken on the questions of set-off here involved and must be regarded as the rule of decision. See *Connecticut Mutual Life Insurance Company* v. *Schaffer*, 94 U. S. 457; *U. S.* v. *Rathbone*, Fed. Cas. No. 16,121.

It is significant to note that even in the above decisions relied upon by the respondents this court advanced as one of the reasons (if not the principal reason) for its conclusions, the desirability of harmony of rules within each State and the avoidance of confusion. The very antithesis of those reasons applies in the instant case, namely, the desirability of harmony and uniformity of rules throughout the several states and the avoidance of confusion in winding up the affairs of national banks. To hold that the Federal courts should follow the State rules in the questions here presented would *prevent harmony* and *create confusion* in the administration of affairs of insolvent national banking associations.

Let us assume an insolvent national bank in Indiana and another in Pennsylvania have among their assets large notes of a solvent partnership, and that each bank owes substantial deposit balances to the individual members of the partnership. To follow the rule applied by the courts below would mean that the individual partners would receive in exchange for their deposit balances in the Pennsylvania bank, partnership notes worth not only the amount due thereon at the date of suspension but also interest at the contract rate provided for in the notes up until the date of payment of such notes, while in Indiana the individual

partners (under the rule followed in that State, *Wolcott* v. *Pierre, supra,* would receive only their ratable share in dividends with all other depositors of the bank in that State. Such ratable dividends would be produced in part at least from the collection by the receiver (of the Indiana bank) of the partnership notes in cash with interest up to the date of collection by the receiver. A comparison of these unequal results demonstrates at a glance that the winding up provisions of the National Bank Act requiring ratable distribution (and none other) to all creditors, and prohibiting preference of one creditor over others, would be rendered impotent by permitting the varying state rules to govern and control question of set-off, which are, in substance, questions of distribution.

It is necessary that a uniform rule be adopted by the Federal courts not only for the reasons stated hereinbefore, but also because of the importance of establishing a precedent for the guidance of the Comptroller of the Currency in administering the affairs of insolvent national banks as was done by the Supreme Court of Georgia in its decision in the set-off case entitled *Powell* v. *Mobley,* 142 S. E. 678, at page 679, wherein that court said:

> "Owing to the importance of establishing a precedent for guidance of the administrative officers of the State banking department, it has been deemed best to decide the case upon general principles of law as set forth in the foregoing division, without reference to special agreements of the parties."

(b) *Set-Off Cases Cited by Court Below, Distinguished.*

TUCKER v. *OXLEY* (1809), 5 Cranch. 34,

was the first equitable set-off case to be decided by this Court and is one of the authorities cited by the court below (District) in the instant case.

In that case Thomas Moore and Henry Moore carried on a partnership until March, 1802, when the firm was dissolved. Thomas agreed to collect the balances due and pay the debts of the firm as far as the joint property would extend and thereafter he continued business on his own account until he became bankrupt during the following September when Oxley was appointed assignee. Prior to the dissolution of the Moore partnership it became indebted to John and James Tucker for $106.49. After the dissolution of the Moore partnership (which was known to the Tuckers), the Tuckers became indebted to Thomas Moore for $118.12. No credit was given by Moore to the Tuckers for the $106.49 due to the latter nor was such credit expressly agreed to. Moore testified, however, that he intended to give such a credit. Oxley brought suit to recover the balance due to Thomas Moore and the Tuckers pleaded set-off which was denied by the lower court.

Mr. Chief Justice Marshall delivered the opinion reversing the court below and allowing the set-off on these grounds: (1) That the partnership debt was recoverable from each member and his property, therefore provable in bankruptcy against the estate of Thomas Moore. (2) That it was fair to conclude that the Tuckers forebore enforcement of the sum due from the Moores in consideration of the dealings with Thomas Moore after dissolution of the Moore partnership.

The facts in *Tucker* v. *Oxley* differ from the facts in the case at bar in the following respects:

(a) The indebtedness of the Tuckers to the insolvent (Thomas Moore) was a joint and several indebtedness, whereas in the instant case the indebtedness of the partnership is a joint indebtedness.

(b) There were facts and circumstances (not present in this case) from which the court found an implied agreement

of set-off, thereby justifying the court in applying the mutual credit doctrine.

GRAY v. *ROLLO* (1873), 18 Wall., 629.

was the next equitable set-off case (involving an insolvent) decided by this Court.

The (District) court below said (R. 9) that "*Gray* v. *Rollo* involves a basically different situation," and (R. 11) that "there is no decision of the Supreme Court of the United States holding otherwise (*than the Pennsylvania rule*). On the contrary, the dictum in *Gray* v. *Rollo* is to the effect that it (*set-off*) would be (*allowable*)" (italics inserted), despite the statement of Mr. Justice Bradley in *Gray* v. *Rollo*, at page 632, that "—we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off."

In that case Gray filed a bill against Rollo, assignee in bankruptcy of the Merchants Insurance Company of Chicago, to compel set-off. Gray and Gaylord (not partners) had given their two joint notes for $5,555 each which were acquired in due course of business by the insurance company. The insurance company became indebted to Gray and his brother as partners for $30,000 on fire losses. Gray contended that his share of the liability on the notes was one-half and he wanted that amount set off against the liability of the insurance company on its policies, alleging that his brother was agreeable to the set-off. The insurance company's demurrer was sustained by the lower court and affirmed by this Court.

Mr. Justice Bradley said that the claims were not mutual debts, even though Gray could have been sued separately on the notes, because the claim on the policy was one due to Gray Brothers, and that the mutual credit doctrine was not applicable because there was no connection between the claims and no reliance of one on the other. The Penn-

sylvania rule permitting non-mutual claims to be set off was rejected and this Court said that no principle of equity in England or in this country would allow the set-off. It was said that no rule of justice or equity requires that Gray Brothers shall be paid in preference to other creditors of the insurance company out of the specific assets represented by the notes of Gray and Gaylord.

The previous decision in *Tucker* v. *Oxley, supra,* was analyzed by Mr. Justice Bradley who stated by way of dictum that the rule in the *Tucker* case would be applicable in the *Gray* case if the insurance company were solvent, and owed Gray alone on the insurance policies and Gray being insolvent was indebted with Gaylord to the company. In that event the insurance company could set off its liability on the policy against the notes of Gaylord and Gray, assuming each of them to be severally liable for the whole debt. The hypothetical facts assumed by this Court in *Gray* v. *Rollo* for the purpose of analyzing and explaining the rule in the *Tucker* case differ greatly from the facts in the case at bar in these respects:

(a) Binenstock (also Swinger) is solvent.

(b) The bank is insolvent.

(c) Swinger and Binenstock are jointly liable, not severally liable.

(d) Swinger and Binenstock are partners and the partnership assets are dedicated to the payment of the firm debts, whereas there was no showing that Gaylord and Gray were partners but rather were merely joint and several makers.

ROELKER v. *BROMLEY-SHEPARD COMPANY, INC.*, 73 F. (2d) 618, Cert. den. 294 U. S. 713.

The decision of the Circuit Court of Appeals for the First Circuit in the *Bromley-Shepard* case was referred to by the District Court below as being a case similar to the

present one except for the fact that the joint obligor who claimed the set-off may have been an accommodation party to the note. The reported decision of the District Court in the *Bromley-Shepard* case discloses that the bill in equity was filed not only by Mrs. Shepard but also by the Bromley-Shepard Company rather than by Mrs. Shepard alone. The District Court overruled the receiver's motion to dismiss, but the Circuit Court of Appeals directed that the note be set off *not against* Mrs. Shepard's deposit but rather against the deposit account of the corporation which received the benefit of the proceeds of the note and which was the real debtor. The *Bromley-Shepard* case differs from the case at bar in another important respect, namely, that the note in the former case was merely a joint obligation of a corporation and an individual, whereas in the instant case the indebtedness is the joint obligation of a partnership. Furthermore, the doctrine of mutual credits laid down in *Scott* v. *Armstrong, supra,* applies in the *Bromley-Shepard* case, but that doctrine has no application in the base at bar.

V.

Other Set-Off Cases Discussed and Distinguished.

BEAUREGARD v. *CASE* (1875), 91 U. S. 134.

Two years after the decision in *Gray* v. *Rollo, supra,* this Court rendered its first decision on a question of set off involving a national bank in *Beauregard* v. *Case, supra.* The facts in the *Beauregard* case differ from those here presented in that under the laws of Louisiana, where that case arose, the liability of Beauregard, May and Graham, as partners, to the bank was a distinctly several liability (not joint, nor joint and several), each partner being liable for a certain portion of the indebtedness of the firm equal to the extent of his interest in the partnership, whereas in the instant case the laws of Pennsylvania fixed the liability of

Swinger and Binenstock as joint (rather than several or joint and several). See discussions *supra*, pages 16 and 17.

Mr. Justice Field in delivering the opinion of this Court denying the set-off gave as one of the reasons for so doing (at page 141): "A partnership debt is not thus offset or compensated by a demand of one individual member against the creditor. There is no mutuality in such cases between the parties." It is difficult to conceive of any language more clearly expressing this fundamental rule upon which your petitioner has relied in originally denying the set-off and in defending this suit from its inception.

The above quotation is of particular significance in that it involved the question of whether or not an individual partner can set off his deposit account against the indebtedness of the partnership, whether solvent or insolvent, to an insolvent national bank.

SCOTT v. *ARMSTRONG* (1892), 146 U. S. 499.

Several questions were certified from the United States Circuit Court of Appeals for the Sixth Circuit in the case of *Scott* v. *Armstrong*. Only two of the questions so certified were answered by this Court. One of the questions answered involved a jurisdictional matter which is not pertinent to the issues presented in the case at bar. In answer to the other question certified this Court decided that the winding up provisions of the National Bank Act did not prohibit or prevent the set-off of a deposit account which was payable at the time of suspension of the bank, against the depositor's indebtedness to the bank even though such indebtedness was payable at a date subsequent to suspension.

As was pointed out in the opinion delivered by Mr. Chief Justice Fuller the set-off in the *Scott* case was proper because there was (1) mutuality of obligation; (2) mutuality of credit, and (3) an implied agreement for set-off (none of

which are present in the case at bar). The *general law* of set-off requiring mutuality was restated. The real question decided in the *Scott* case was that set-off was not defeated merely because the indebtedness of the depositor to the bank had not matured at the date of suspension. It is respectfully submitted, however, that the principle laid down in the *Scott* case fully supports the position and contention of petitioner in this case. Applying by way of paraphrase the doctrine enunciated by Mr. Chief Justice Fuller in the *Scott* v. *Armstrong* decision at page 510—it can be said:

> *The requirement of the National Bank Act (in so far as the collection of the partnership notes is concerned) as to ratable dividends, is to make them from the assets of the bank, which include a sufficient portion of the partnership assets to pay the partnership notes.*

and conversely,

> *The partnership assets which at the time of the insolvency of the bank belong of right to all of the depositors do not belong to the individual partners.*

Also may be noted the statement of Mr. Chief Justice Fuller—

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference * * *."

The clear implication from this language is that where a set-off is invalid such as the set-offs involved in the case at bar, it is not perceived how it can be validated by the winding up provisions of the National Bank Act which contemplate ratable distribution to all creditors alike with preferences to none.

The decision in the *Scott* case likewise supports petitioner's contention that set-off as applied to national banks is a matter of substance in that this Court discussed the matter from the viewpoint of the rights and equities of the

parties rather than from the viewpoint of its procedural aspects.

WISDOM v. *GUESS DRY CLEANING COMPANY*, 5 Fed. Supp. 762.

District Judge Holmes permitted set-off in the *Guess Dry Cleaning Company* case which involved the joint and several indebtedness of the partnership to an insolvent national bank rather than a joint indebtedness such as exists in the instant case. The court found as a fact that one of the partners in the *Guess* case was (insolvent) unable to make any substantial contribution toward the payment of the firm indebtedness, whereas in the case at bar there is no suggestion that either the firm or any of the partners is insolvent.

BARRINGTON v. *MANER* (C. C. A. 5), 54 F. (2d) 917.

The receiver of a national bank filed suit against Barrington (maker) and Horn (endorser). Barrington pleaded set-off of two partnership deposits owned on the date of suspension of the bank by the defendants. The interest of Horn in these accounts was assigned to Barrington after the bank closed but before the suit was filed. It was held that the notes were in reality the debt of the partnership and that set-off was proper. The court looked through the form, not only of the note but also of the pleadings, when it said, at page 918: "* * * the debts are not deprived of their mutuality merely by the circumstance that the suit was brought against the partners as individuals."

SHANNON v. *SUTHERLAND* (C. C. A. 4), 74 F. (2d) 530.

Shannon and five other persons borrowed a substantial sum from the bank to purchase a tract of land. The notes (which aggregated $9,450. when the bank closed) were

signed as trustees and were endorsed by each of the six persons interested in the purchase of the property. An agreement among them signed at the time of the execution of the original note, provided that upon failure of any one of them to pay his proportionate part of the liability the interest in the property to which he would otherwise be entitled should belong to the one or ones paying the amount of his liability. Two of the parties to the instrument became insolvent and paid nothing. Three of the others paid three-fourths of the amount due on the note, leaving a balance of $2,362.50 and interest. Shannon filed a bill in equity against the receiver of the bank seeking to set off the balance due on the note against a like portion of his deposit account which amounted to $2,657.83 at the time of the bank's failure. The District Court denied the set-off of any portion of the debt. The Circuit Court of Appeals reversed the District Court and permitted Shannon to set off one-sixth ($1,575.00) of the principal of the note which was due at the time the bank closed, being the extent to which he was primarily liable, and one-twelfth of the principal of the note representing that portion of his secondary liability for which he was not indemnified.

Circuit Judge Parker, in his well-reasoned opinion, stated at the outset that the matter there involved was one of substantive right and not of procedure. He further pointed out that if the entire principal of the note were set off against Shannon's account he would be partially indemnified by reason of his right of contribution from the other solvent obligors. In discussing the secondary liability of Shannon it was pointed out that he had indemnity to the extent of the interest he would acquire in the real estate by reason of the default of the two insolvent obligors. The situation in *Shannon* v. *Sutherland* is closely analogous to the situation here presented in these respects:

(a) Shannon was indemnified by reason of his right of contribution against other primary obligors as is each of the respondents here.

(b) In equity there is a secondary liability on the part of each of the respondents here in that the partnership debts should be collected first from the partnership assets before proceeding against the invidual partners.

(c) The case at bar is weaker from the viewpoint of respondents than was the Shannon case from the viewpoint of the plaintiff in that the partnership assets are dedicated to the payment of the notes involved in the instant case, whereas there were no assets pledged nor dedicated to the notes executed by Shannon and others.

An application of the rules laid down in *Shannon* v. *Sutherland* would justify only one result in the case at bar, namely, the denial of set-off to any extent because each of the respondents would be wholly indemnified. Application of the rules in the *Shannon* case would bar set-off of respondents' individual deposit accounts not only against the partnership notes but also against the Cammarota notes.

FIRST NATIONAL BANK OF INDIANOLA v. *MALONE* (C. C. A. 8), 76 F. (2d) 251.

The indebtedness involved in the *Malone* case was the joint and several obligation of husband and wife, not the joint obligation of partners. The deposit account carried in the name of the administrator of the estate of the deceased husband which the court permitted to be set off against the note, constituted a part of the assets of the estate which were dedicated in equity to the payment of the indebtedness of the decedent to the insolvent bank. In the case at bar the individual deposits of Swinger and Binen-

stock were not dedicated in equity or otherwise to the payment of the debts of the partnership.

The decision in the *Malone* case supports the contention of petitioner in this case in holding at page 254 that set-off is a matter of substance.

IN RE SCHULTS ET AL. (D. C. N. Y.), 132 Fed. 573.

In the above case District Judge Hazel denied set-off of the debt of Wilcox and son (a solvent partnership) due to a bankrupt banking firm (W. J. Schults and Company) against a claim due from the insolvent bankers to one of the Wilcox partners, and cited *Gray* v. *Rollo, supra,* as distinguishing *Tucker* v. *Oxley* by pointing out that the debt due from the Moores to the Tuckers was joint and several, consequently enforceable against either; whereas the debt of Wilcox and Company (like the debt of Swinger and Binenstock in this case) to the insolvent was a joint indebtedness. The facts in the *Schults* case are substantially identical with those here presented, the only difference being that the *Schults* case was one which arose in bankruptcy, whereas the instant case involves an insolvent national bank, but we submit, both cases are controlled by the same principles and rules of general law.

Conclusion.

It is believed that the foregoing discussion demonstrates that the propositions enunciated, as well as the results reached by the courts below, are in direct conflict with the applicable principles controlling decisions of Federal courts on questions of general law involving set-off as applied to insolvent national banks. If the rulings made by the lower courts are permitted to stand, serious and far reaching effects will be produced, confusion will be created in the administration of affairs of closed national banks, and set-off would be available solely on the ground of insolvency of

the bank, even though mutuality is lacking in many respects and despite the fact that the equities favor (both in number and in quality) the other depositors and creditors of the insolvent association.

It is therefore respectfully submitted that the decision below should be reversed and remanded with directions to dismiss the respondents' bill of complaint with prejudice.

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APPENDIX.

Statutes Involved.

U. S. C. Title 12, Section 91 (Sec. 5242 U. S. R. S.) provides:

> "*Transfers by bank and other acts in contemplation of insolvency.*—All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court."

U. S. C. Title 12, Section 192 (Section 5234 U. S. R. S.) provides in part:

> "Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings."

U. S. C. Title 12, Section 194 (Sec. 5236 U. S. R. S.) provides:

> "*Dividends on adjusted claims; distribution of assets.*—From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

Purdon's Pa. Stat. Ann., Title 59, Sec. 102 (Uniform Partnership Act, Sec. 40) provides in part:

> "*Rules for distribution.*—In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> (a) The assets of the partnership are—
>
> I. The partnership property,
>
> II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.
>
> (b) The liabilities of the partnership shall rank, in order of payment, as follows:
>
> I. Those owing to creditors other than partners,
>
> II. Those owing to partners other than for capital and profits,
>
> III. Those owing to partners in respect of capital,
>
> IV. Those owing to partners in respect of profits.

Other Statutes Cited and Discussed.

U. S. C. Title 28, Sec. 724 (914 U. S. R. S.) provides:

> "*Conformity to practice in State courts.*—The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the District courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding."

U. S. C. Title 31, Sec. 191 (Sec. 3466 U. S. R. S.) provides:

> "*Priority established.*—Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 36.

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania, *Petitioner*,

v.

ISRAEL BINENSTOCK, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, and BESSIE SWINGER, Individually and as Executrix of the Estate of Benjamin Swinger, Deceased, *Respondents*.

REPLY BRIEF OF PETITIONER.

Respondents' brief raises questions and advances arguments which petitioner deems advisable to discuss.

1. There is No Dispute in this Case as to "Who May be a Creditor and to What Extent."

Respondents state (page 4 of their brief) that the basic question here at issue is "who is a creditor and to what extent." Petitioner submits that the real or fundamental inquiry in this or any other set-off case involving an insol-

vent national bank is two fold, viz: (a) "who is the real debtor?" (on the partnership, as well as on the Cammarota notes) and (b) "whose money or claim is proposed to be used by way of set-off?"

This test was applied in the comparatively recent decision by District Judge Maris of the Eastern District of Pennsylvania in *Kardon* v. *Willing*, 20 Fed. Supp. 471, involving a factual situation quite similar to the one here presented. This test has even been applied by the Pennsylvania courts. See *Gordon, et al.*, v. *Union Trust Company of Pennsylvania*, 308 Pa. 493, 162 At. 293, wherein Mr. Justice Kephart said, inter alia—

> "The names in which suit could be brought and defended furnish an indication, but are not the only criterion, of the right of set-off. To whom do the funds really belong? Mutuality of right in a set-off is not circumscribed by the 'right to bring an action' but the broader question may be and generally is, of importance. Whose money or claim is proposed to be used as a set-off? This is the true equitable principle which governs such questions."

Further to the effect that the mere right to sue is not the real test as to the right of set-off, see petitioner's main brief, p. 18.

2. It is Not Clear that Set-off Would Be Available in this Case Even Though the Pennsylvania Rule Were to be Applied.

From pages 21 to 35, a considerable portion of respondents' brief undertakes to show that *under Pennsylvania decisions* set-off would be available in this case. Petitioner considers that it makes no difference whether the Pennsylvania rule on off-sets is in accord or in conflict with the Federal rule. Petitioner deems it advisable, however, to point out that his analysis of the Pennsylvania cases cited by the respondents leads petitioner to the conclusion that those decisions do not "clearly sustain the (respondents') bill," as stated by the District Judge below and by the respondents on page 21 of their brief.

It is important to note that in none of the cases cited by respondents was the creditor of the partnership a bank or an insolvent. Furthermore, all of the Pennsylvania cases cited by the respondents and by the courts below involved legal set-off as distinguished from equitable set-off which is here involved. As hereinafter indicated, these distinctions are important.

Mr. Justice Duncan stated his view in *Stewart* v. *Coulter* (1825), 12 S. & R., 252 and 253 (respondents' brief, pages 22, 23):

> "At the trial my opinion was, that the indebtedness of the plaintiff to one defendant, was of itself, *unless there was some superior equity in a third person* a subject of set-off by that defendant, although he had been sued with others, * * *." (Italics ours.)

There are many superior equities in the instant case in favor of third persons (general creditors of the subject insolvent bank) as pointed out and discussed in petitioner's main brief, pages 22-24.

The case of *Cochran* v. *Cutter,* (1901), 18 Pa. Super. Ct. 282, cited and discussed at page 24 of respondents' brief, involved a plea of set-off filed by defendant in an action of assumpsit, a law action. Presiding Judge Rice in the opening statement of his opinion in the Cochran case (page 283) quoted from the opinion of Mr. Justice Mitchell in *Hibert* v. *Lang,* 165 Pa. 439, wherein the last-named Justice reviewed the previous Pennsylvania decisions involving set-offs and said:

> "The result of these cases is that although in general in order to support a set-off there must be cross-demands between the same parties and in the same rights, such as would sustain mutual actions against each other, yet wherever there is the practicability of avoiding circuity of action and needless costs, with safety and convenience to all parties, *or where there is a special equity to be subserved, and no equity of third parties to be injured,* a set-off will be allowed upon equi-

table principles, though the case does not come within the language of the statute." (Italics ours.)

In the case at bar petitioner has pointed out in his main brief that there is no special equity in favor of respondents to be subserved by permitting the set-off here sought, but on the contrary there are many superior equities in favor of third parties (other depositors of the bank) which would be injured if the set-off were to be permitted.

This Honorable Court rejected what was represented to be the Pennsylvania rule of set-off in *Gray* v. *Rollo,* 18 Wall. 629, but in so doing Mr. Justice Bradley said, at page 632:

> "In that State (Pennsylvania) under the decisions there *it is probable* that set-off would be allowed in such a case as this." (Matter in parentheses and italics ours.)

Indicating by the use of the words "it is probable" that this court was not certain that the Pennsylvania decisions would permit set-off of a separate demand against a joint debt in every situation.

The comparatively recent decision (1918) of the Pennsylvania Supreme Court in *Mintz* v. *Tri-County Natural Gas Company,* 259 Pa. 477, 103 At. 285, (cited in respondents' brief, page 22) recognizes the substantial difference between joint, several, and joint and several obligations and also recognizes the general doctrine that joint demands cannot be set off against separate claims. The court took particular pains in the Mintz case to point out that in the Childerston, Stewart, and Cochran cases (discussed on pages 22-24 of respondents' brief) no harm resulted from an agreement of the joint obligors to an adjustment of the proceeds of set-off, thereby inferring, petitioner respectfully submits, that if any harm would have resulted from the agreement of the joint obligors to the set-offs, they would have been denied by the Pennsylvania Courts. (See further discussion of this case, *infra,* p. 6.)

3. Even if the Partnership Obligations Are Joint and Several, Set-off Would Not Be Proper in this Case.

The respondents lay much stress upon the contention that, under the law of Pennsylvania, there is no practical distinction to be drawn between a "joint" and a "joint and several" obligation, and allege that if the bank had brought an action against the partnership on these notes, it could claim in execution the assets of the individual partners. Respondents then state that upon suit against the bank by the individual partners for their individual deposits, the judgments would be in all respects mutual for the purpose of off-set, and that this procedure is barred in this case by the bank's insolvency.

Petitioner submits that it is a fundamental rule of law, upon obtaining judgment against a partnership, or its members as such, that execution must first go to the joint assets of the partnership for satisfaction, in so far as such assets may respond, and that only thereafter do the partners become individually or personally liable for the deficiency. A careful examination of the Pennsylvania statutes cited by respondents discloses no provisions to the contrary, and there are no cases of Pennsylvania or of any other state cited by respondents as authority therefor. Furthermore, there is no showing of insolvency of the partnership, and for the purpose of decision in this case, it must be assumed that the partnership was solvent at the time of its dissolution, which, as a matter of fact, it was. (Respondents' brief, p. 13.)

Our understanding of respondents' contention in this connection is: that if a judgment had been obtained by the bank against the partnership, then substantial mutuality would come into being for the purpose of set-off. Conceding for discussion only that respondents' contention in this respect would be correct if the bank had not failed, petitioner submits that the mutuality contended for does not now exist because no judgment has been obtained against

the partnership and if judgment were to be obtained hereafter such mutuality would come into being after the suspension of the bank and therefore set-off would not be available. See discussion, *infra*, pp. 9-10, of *Hulse* v. *Knapp*, 20 Fed. Supp. 137, 138. See also *U. S. F. & G. Co.* v. *Wooldridge* (C. C. A. 5), 295 Fed. 847, 849, affirmed 268 U. S. 234; *McCandless* v. *Dyar* (D. C. S. D.), 34 Fed. (2d) 989; *Dickens* v. *Howard* (C. C. A. 5), 67 Fed. (2d) 263.

In the decision of the Pennsylvania Supreme Court in *Mintz* v. *Tri-County Natural Gas Co.*, 259 Pa. 477; 103 At. 285 (cited in respondents' brief, page 24), the court, while reiterating the principle that a joint debt cannot be set off against a several debt, also indicates at page 286 the circumstances under which the Pennsylvania authorities will grant a set-off of joint obligations against several or individual claims of the obligors:

> "Since the defendant cannot maintain a suit against the present plaintiff alone, for the breach of contract which it contends it has a right to take advantage of in this action, it follows that the defendant is not in a position to use this alleged breach in defense as a set-off; for the rule requiring mutuality of debts, where set-off is pleaded, forbids the setting off of a joint debt against a separate one. 34 Cyc. 712, 727, 730. 'Mutuality of debts is the essential circumstance in set-off.' Cramond et al., Ex'rs, v. Bank of United States, 1 Bin. 64, 69; McDowell v. Tyson, 14 Serg. & R. 300; see, also, Milliken & Co. v. Gardner, 37 Pa. 456; Schlacher v. Bergdoll, 41 Pa. Super. Ct. 547, 550, 551; and, on the general subject involved, Hibert v. Lang, 165 Pa. 439, 30 At. 1004.
>
> "The cases which hold that two or more persons sued jointly may set off a debt due by the plaintiff to any one of them (Childerston v. Hammon, 9 Serg. & R. 68; Stewart v. Coulter, 12 Serg. & R. 252, 14 Am. Dec. 680; Cochran v. Cutter, 18 Pa. Super. Ct. 282) have no application here, since they rest upon the theory that defendants have the right to agree among themselves as to the adjustment of the proceeds of the set-off, and hence no *harm* is done to any one. This rule

> also permits one of two joint obligees, with the consent of the other, to use the obligation as an equitable defense in an action by the obligor against one of them alone (Smith & Co. v. Myler & Aber, 22 Pa. 36; Cochran v. Cutter, supra) for, again, no *harm* is done; * * *." (Italics inserted.)

The "harm" in allowing the set-off in the case at bar would be done to the other depositors and creditors of the bank in that the partnership assets which are dedicated to the payment of the partnership debt to the bank would be made available to the respondents only rather than to all of the other depositors and creditors of the bank. Furthermore, respondent Binenstock would be entitled to contribution from the estate of the deceased partner Swinger as pointed out in petitioner's main brief (pages 22-24).

While respondents state that there is no practical distinction in Pennsylvania between a joint obligation and a joint and several obligation, yet all of the statutes and decisions relied upon for this proposition are conceded by respondents to be remedial only, see page 11 of respondents' brief wherein the following statement is made:

> "Even if there were no State statutes the difference between a joint and joint and several obligation has been purely one of procedure except in so far as acts in the nature of a release were indulged in."

See also quotation appearing on page 9 of respondents' brief from *Miller* v. *Reed*, 27 Pa. 244, reading in part as follows:

> "The distinction always had regard to remedies."

It is petitioner's position that set-off as applied to insolvent national banks is a matter of substance and not form nor procedure (petitioner's main brief, pages 8-12).

Respondents at page 12 of their brief state:

> "Petitioner would seem to admit by very clear inference that if the liability of the partners constituting the

firm of Swinger and Binenstock on the notes here in question were both joint and several, the set-off requested would surely be allowed."

Petitioner concedes for discussion only that *at law* a separate demand may be set off against a joint and several demand. The instant case, however, is not an action at law but rather is a suit in equity, and therefore the rules of equity rather than the rules of law will control.

A court of equity will not look to the form of the obligation, *Scott* v. *Armstrong*, 146 U. S. 499; *Building and Engineering Co.* v. *Northern Bank*, (N.Y.) 90 N. E. 1044; *Barrington* v. *Maner*, 54 Fed. (2d) 917, but rather will examine into the facts to determine who is the real and ultimate obligor, *Shannon* v. *Sutherland*, (C. C. A. 4) 74 Fed. (2d) 530; *Building and Engineering Co.* v. *Northern Bank, supra; Barrington* v. *Maner, supra.*

Consideration of applicable law in this case reveals that the partnership assets constitute the primary fund out of which the partnership debts must be paid (See petitioner's brief, page 17) and the position of the individual respondents is in equity analogous to sureties or endorsers. (See cases petitioner's brief, pages 25-26.)

4. Mutual Credit Doctrine Relied Upon by Respondents Not Applicable Here.

Respondents' brief. (Pages 13, 14) places considerable reliance and stress upon the supposition that the bank extended credit to the partnership in reliance upon an agreement, either express or implied, that the deposit accounts of the respective partners could be used to apply on or extinguish the partnership debt. Respondents, however, failed to point out wherein that doctrine, sometimes called the "mutual credit" doctrine (*Scott* v. *Armstrong*, 146 U. S. 499, 507) applies.

Petitioner respectfully submits that the mutual credit doctrine is of no avail to the respondents here because there

is no allegation in the bill of complaint nor elsewhere in the record of this case that any agreement, express or implied, existed between the parties which would enable the bank to appropriate or apply the individual deposit accounts of the respondents on the partnership debts.

Certainly the great weight of authority supports the view that a bank cannot apply an individual deposit to the payment of a debt owing to it by a firm of which the depositor is a member. See Michie on Banks and Banking, Volume 5, page 276; 3 R. C. L. 591; 7 C. J. 659. Since the bank could not have appropriated the individual deposits of respondents to apply on the partnership debt *before* the bank suspended business it *cannot be said* that the bank had a *greater right after* it closed. Inasmuch as the bank could not appropriate the deposit accounts of the individual partners, a harmonious ruling requires that the respondents as individuals cannot appropriate the partnership debt for application on their deposit accounts. In other words, there must be mutuality of right.

5. Recent Set-off Decisions.

Subsequent to the filing of the main briefs by petitioner and respondents, two decisions of United States District Courts have been reported which support the position of petitioner in this case.

Hulse v. *Knapp* (D. C., W.D., N.Y.) 20 Fed. Supp. 137.

In that case suit was brought by Hulse, as receiver of a national bank, against Knapp, individually, on a $500 note. The Knapp Drug Company, a co-partnership, had a deposit account of $2,582.66 in the bank. The defendant, being a partner owning a one-half interest in the firm, sought, with the consent of his co-partner, by the filing of an equitable defense plea, to set-off his individual liability on the $500 note against a like amount of the firm's deposit account.

District Judge Knight denied the set-off for these reasons, inter alia:

(a) The debts do not run solely between the same parties.

(b) Joint demands may not be set off against separate demands.

(c) Bank could not apply individual deposit to satisfaction of partnership debt. Therefore, an harmonious ruling requires that the partnership cannot set off its deposit account against the individual debt.

(d) The allowance of set-off would violate the equitable distribution mandate of the National Bank Act by giving the firm as depositor a preference over other creditors.

(e) Set-off must be determined in the light of the National Bank Act.

(f) Mutuality by virtue of consent of co-partners was created after suspension. Therefore, allowance of set-off would violate the rule requiring mutuality at suspension.

In the case at bar mutuality on the theory advocated by respondents would only come into being after judgment had been obtained against the partnership and since no judgment has been obtained no mutuality now exists. Even if judgment were later to be obtained the mutuality would come into existence after the suspension of the bank and therefore set-off would not be available.

Petitioner further submits that the reasoning employed and the result reached by District Judge Knight in the Knapp case in all respects supports our position and contention in the instant case.

Kardon v. *Willing* (D.C., E.D., Pa.) 20 Fed. Supp. 471.

Kardon, as trustee for his son, created and maintained a deposit account in the Sixth National Bank of Philadelphia. This account had a balance of $11,268.75 at the date of sus-

pension of the bank. Kardon was endorser on notes totalling $7,603.20. Makers of notes totalling $7,328.20 were unable to pay. After the bank closed Kardon revoked the trust for his son and sought to set off his liability as endorser on the notes against a like amount of the deposit account carried in trust for his son. In denying the set-off District Judge Maris said:

> "There is no doubt as to the right of a depositor in a closed bank to set off the amount of his deposit against his liability as endorser upon a note held by the bank *provided the maker of the note is insolvent.*" (Italics ours.)

This reasoning clearly supports the petitioner's contention that the firm of Swinger and Binenstock could not have set-off the firm deposit against the endorsement liability of the partnership on the Cammarota note; a fortiori, the individual members of the partnership cannot set off their separate deposit accounts against that endorsement liability.

It is respectfully submitted that the decision of the courts below should be reversed.

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No. [redacted] 36 October Term, 1936

In the

Supreme Court of the United States

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania

Petitioner

vs.

ISRAEL BINENSTOCK, Individually, and as surviving partner of the partnership firm of SWINGER AND BINENSTOCK, and BESSIE SWINGER, Individually, and as executrix of the Estate of Benjamin Swinger, deceased.

Respondents

Brief for Respondents in Opposition to the Petition for Writ of Certiorari

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BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

1. INTRODUCTION

The statements contained in the petition under the headings "Summary Statement of Matters Involved," "Opinions of the Courts Below," "Jurisdiction" and "Statutes Involved" are correct.

The petition, however, makes a fundamental error in stating the Respondents' premise and a further error of argument.

The Respondents do not contend that Congress, if it chooses, may not provide by statute when set-off shall be allowed in liquidating a national bank. The Respondents' position is that Congress has not done so. The pertinent statute* provides only that there shall be a "ratable dividend." Who may be a creditor and to what extent is not covered at all. To extend in the statute the provisions necessary for such a determination would require a

*Section 5236 U. S. R. S. (U. S. C. Title 12 Sec. 194); petition p. 6.

statement of all known civil law with daily amendments. The determination of who are creditors and to what extent depends on the law of the locality or upon general law according as local or general matters are involved. Many facts may be conceived which would establish a creditor position in one state and not in another. There can no more be unformity upon this subject than upon many others. There might be uniformity upon the single subject of set-off if all the states' legislatures so required. They have not done so and there are differences of result in different states.

Congress might have required uniformity upon the question of set-off in the liquidation of national banks but it has not done so. Consequently, there may be lack of uniformity but that lack has not yet appeared. All the cases on the subject in the liquidation of national banks arrive at the same result upon the point involved in this case. The only case cited in the petition as being in point is *In re Schults*, 132 Fed. 573 (D. C. N. Y.) petition, page 13. The facts in that case are not given in the petition. It appears that the bank in that case was a private bank in bankruptcy in New York and not a national bank in liquidation. The court relied on the New York rule.

At page 14 the petition cites a case from Indiana and urges the adoption of the Indiana rule as the correct one. There is no reason why it should not

be the rule in Indiana. But an Indiana case goes no further to establish a uniform federal rule than do the Pennsylvania cases which reach an opposite result.

As will be shown below the decisions of the federal courts are in accord with the decision of both courts below in this case. But if this were not so, it might well be questioned whether there should be a general uniform rule to establish the right of set-off in national bank liquidations. Banks are not created to be liquidated and there is no reason why the convenience of the Comptroller of Currency should for no other reason than his convenience prevail over other considerations. The operation of national banks necessarily should be uniform because the right to operate is derived from a single source. But the property rights and contractual considerations which determine who shall be a creditor and to what extent originate in local law. If local law is not recognized, two banks, side by side will liquidate in different ways. Local uniformity rather than national uniformity is desirable in such a case.

Realizing that local law is the primary origin of creditor rights against a national bank Congress has not attempted to replace that law with a whole body of law applicable only to national banks. Even the provision for a "ratable dividend" is not peculiar to the liquidation of national banks.

Respondents agree with the petition (P. 10) "The National Banking Act is not affected by state statutes or decisions in conflict therewith." There is however no provision in the act to resolve the question in hand. The only recent federal decision is in accord with the decision in this case. Whatever "Federal rule" there is has been followed. As a matter of fact there are not enough cases to make much of a "Federal rule." So the court below accepted the Respondents' invitation to observe that the Pennsylvania cases are in accord, thus producing at least local uniformity.

A brief discussion of the cases follows:

2. UNDER THE FEDERAL CASES THE SET-OFF SHOULD BE ALLOWED

The bill of complaint is filed to take advantage of the rule recognized in the federal courts as well as in the Pennsylvania courts that equitable set-off will be allowed under the circumstances recited because, the bank being insolvent, it would deprive

the plaintiffs of a remedy they had before the failure, not to allow the set-off.

The theory is that while the obligation of the partnership firm to the bank is a joint obligation, liability therefor is both joint and several. In other words, if the bank sues the partnership firm it may secure a joint judgment, but at that point the lack of mutuality, if any exists, ceases. The partners are individually liable each for the entire amount of the partnership indebtedness in execution upon the judgment against the firm. Therefore, as a matter of equitable fact, the individual partners are liable severally to the bank on the partnership obligation. Under these circumstances, it would be inequitable to allow the bank to enforce its claims and not allow the set-off.

1 Williston on Contracts, Sec. 316

> "The idea (of a joint obligation) ceases to be practical when a judgment has been rendered against joint contractors and the plaintiff wishes to satisfy that judgment."

Therefore, if the bank brought an action against the partnership firm on these notes, it could claim in execution the assets of the individual partners. Suppose then the individual partners should bring suit against the bank for their individual deposits and secure judgments. The case would then be one of complete and perfect mutuality. The indi-

vidual partners could then come into equity and demand an offset of the claims. The only reason this procedure cannot take place at law is by reason of the insolvency of the bank making it impossible for the individual depositors to bring suit to recover their deposits. It is inequitable that the bank should be permitted to secure rights which it would not otherwise possess by reason of its own insolvency and consequent default.

The cases generally allow an equitable set-off at the outset under these circumstances where one of the debtors is either insolvent or a non-resident.

The precise case has arisen in the First Circuit and the equitable set-off has been allowed. This is the only case in the federal courts directly in point.

Roelker v. Bromley-Shepard Co., Inc. et al
73 Fed. 2d, 618 (1934) C.C.A. 1

Certiorari denied, 294 U. S. 713

In this case a corporation and an individual were obligated to a national bank on a joint note. When the bank closed both the corporation and the individual had deposits at the bank in excess of the note. A bill in equity was brought to compel the offset. First, a motion to dismiss was filed and overruled. The case went to trial on an agreed statement of facts, and a final decree was entered allowing the offset. This decree was appealed by

the receiver of the bank to the Circuit Court of Appeals for the First Circuit and the decision was affirmed.

All of the arguments here advanced by the petitioner were advanced in that case. Reference was first made to the provisions of the National Banking Act (12 U. S. C. A. Sec. 21 *et seq.*) which require a ratable distribution of the bank's assets among its creditors. It was contended that this precluded the possibility of set-off. This argument, many years ago, was rejected by this Court in a case which will be referred to below. In the Bromley-Shepard case the Circuit Court of Appeals for the First Circuit states, at page 619:

> "We do not think Congress intended by the National Bank Act to deprive depositors of the right of equitable set-off when justice requires it. The language of the court in Scott v. Armstrong, *supra,* in discussing this statute, is applicable to the situation here:"

Upon the merits, the same court stated:

> "(2) Conceding that at law, and generally in equity, a claim of one of two joint obligors cannot be set off against the joint debt, it is well established that, where justice requires, and there is no adequate remedy at law, a court of equity under such circumstances will

order a set-off, and a bill in equity to compel such set-off is a proper form of remedy."

* * *

"(4) Under the circumstances of this case, we think that justice requires that so much of the deposit of the Bromley-Shepard Company, Inc., in the insolvent bank as was necessary to pay the joint note, should be set off against the corporate note of the Bromley-Shepard Company, Inc., though the note was also signed by the treasurer of the corporation as a comaker."

This Court denied a petition for certiorari (294 U. S. 713). The only change in the authorities since then is the decision of the case at bar in accord.

Scott v. Armstrong, 146 U. S. 499 (1892)

In this case a national bank became insolvent and its assets were taken over by a receiver. Upon the date of the insolvency it held a note against a depositor who had a deposit at the bank. Because the note was not due at the date of insolvency, it was contended that the set-off should not be allowed and that in any event set-off was not allowable under the provision of the National Banking Act providing for a ratable distribution of the assets of a closed bank. Chief Justice FULLER, in

an opinion allowing the set-off, dealt with this argument at page 510:

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

and at page 511:

> "We are dealing in this case with an equitable set-off, but if on June 20 the note had matured and each party had a cause of action capable of enforcement by suit at once, upon the argument for the receiver the legal set-off would be destroyed just as effectually as it is contended the equitable set-off is. We cannot believe Congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank."

The question of allowing a joint claim to be set off against the separate claims of the joint debtors had been previously dealt with by way of dictum by this Court.

Gray v. Rollo, 18 Wallace, 629 (1873)

In the case cited above the facts were as follows: The insolvent claimant was a fire insurance company. It held notes on which Moses Gray and one Gaylord were jointly liable. It owed money upon a fire loss, not to Moses Gray individually, but to a partnership consisting of Moses Gray and his brother Franklin Gray. Moses Gray attempted by a bill in equity to compel the insurance company to set off the amount due on the policies to Gray Brothers against the joint obligation of himself and Gaylord. He alleged in his bill that his brother Franklin assented to and authorized the appropriation of half of the amount due on the policies to the extinguishment of his liability upon his joint note to Gaylord, but this Court apparently considered that this allegation was unimportant. This Court distinguished from the facts before it a number of other cases, among them, *Tucker v. Oxley,* 5 Cranch, 34. At page 634, in the opinion in Gray v. Rollo, Justice BRADLEY says:

> "But the case of Tucker v. Oxley will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt,

but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which the bankrupt had against Tucker."

It is clear that under the federal decisions the set-off should be allowed.

3. UNDER THE PENNSYLVANIA DECISIONS THE SET-OFF WOULD BE ALLOWED

The court below states (R. 12):

"The law of the State of Pennsylvania if applicable would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. *Stewart v. Coulter,* 12 S. & R.

252; *Cochran v. Cutter,* 18 Pa. Sup. Ct. 282. See also *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477."

Childerston, et al v. Hammon, 9 S. & R. 68 (1822)

In this case an action was brought, upon a single bill, against two defenders jointly. The defendants proved that the plaintiff did not own the action but that it was owned by a third party, named John Hammon, and that the action was being brought for his benefit. The defendants further proved that John Hammon was indebted to one of the defendants in a sum greater than the amount due upon the single bill. The trial court rejected this evidence. This decision was reversed and a new venire ordered upon the theory that if these facts were true the set off should be allowed.

Stewart v. Coulter, 12 S. & R. 252 (1825)

In this case an action was brought upon a claim by Stewart against two joint defendants, Coulter and Day. The trial court allowed as an offset a claim by Coulter alone against Stewart. The action was brought in the Supreme Court sitting at *nisi prius.* Upon motion for a new trial the trial judge stated, at page 253:

"At the trial, my opinion was, that the indebtedness of the plaintiff to one defendant

was, of itself, unless there was some superior equity in a third person, a subject of set-off by that defendant, although he had been sued with others, and might be set off on the trial under our act of assembly, which has been always considered as more comprehensive than the British statutes of 2 Geo. II, Ch. 22, and 8 Geo. II, Ch. 24. That opinion has not been changed, and is unchangeable; for if the very able arguments of the counsel of the plaintiffs could not change it, it cannot be shaken."

Justice GIBSON filed a separate opinion in which he states as follows:

"For myself, I cannot admit that this set-off could be claimed at law, or that there is in this respect any material difference between our act of assembly and the Stat. 2 Geo. II, Ch. 22. But whatever difference does exist, is against the set-off, our act having regard to cases where a balance may be recovered by the defendant, and it cannot be said that partners may recover a debt separately due to one of them. But I throw this out only as my own opinion, and as we all agree that the debt due by Stewart to Coulter was a proper subject for equitable defalcation, I shall rest the opinion of the court on that ground alone."

Cochran v. Cutter, 18 Pa. Super. Ct. 282 (1901)

In this case the surviving partner of a firm composed of two persons engaged the plaintiff, one of their customers who was indebted to them, to work for a new firm formed to carry on the business after the death of his co-partner. The persons constituting the new firm were the surviving partner, the widow and the sole heir of the deceased partner. The question was whether they could set off the plaintiff's debt to the old firm against his claim against the new firm. At page 284 Judge RICE says:

> "Accordingly it has been held repeatedly in Pennsylvania although the rule seems to be different in some of the other states of the Union, that two or more defendants jointly sued may set off a debt owing by the plaintiff to one of them:"

The foregoing three cases were cited by the Supreme Court of Pennsylvania in the case of *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477 (1918) at page 482. They were distinguished but in no manner criticized and it may, therefore, be taken that they still represented the views of the Supreme Court of Pennsylvania. There are no later cases.

4. THE FEDERAL COURTS WILL GIVE WEIGHT TO STATE COURT DECISIONS IN DECIDING A QUESTION OF GENERAL LAW

The 34th Section of the Judicature Act of 1789 provides:

> "That the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

In the early case of

Swift v. Tyson, 41 U. S. 1 (1842)

this Court announced the doctrine that this section of the Judicature Act applies only to the statutes of the States as construed by their courts and to purely local matters, such as the title to real estate and that the so-called common law or decision law of the States on matters of general law is not binding upon the federal courts.

This case has been the subject of an enormous amount of controversy and it is now generally

recognized that the decision was probably wrong. It has never been overruled, is still sometimes cited, and very frequently distinguished.

There is an article of some 83 pages in length in

37 Harvard Law Review, 49

This article refers to the original documents to which Justice STORY, who wrote the opinion in Swift v. Tyson, did not have access, and shows that if he had known the facts back of the drafting of Section 34 his decision would have been otherwise. The article states, at page 52:

> "Had Judge STORY seen this original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was."

and at page 85:

> "It now appears from an examination of the Senate Files, however, that if Judge STORY and the Court had had recourse to those Files in preparing the decision in Swift v. Tyson, it is highly probable that the decision would have been different, and that the word 'laws' in Section 34 would have been construed to include the common law of a State as well as the statute law. This conclusion will probably be reached by anyone who examines the original slip of paper on which

the amendment containing Section 34 was written, and which is, with little doubt, in Ellsworth's handwriting."

Professor Beale, in his new book

The Conflict of Laws, Vol. 1, page 25, section 3.5 (1935)

says, concerning the decision in Swift v. Tyson, at page 26:

"This decision, unfortunate in that it unsettled the minds of lawyers as to the law and thus made it difficult to advise clients, was nevertheless quite within the right of the court; the federal court in the state was given by the Constitution of the United States as full power to declare the law as the state court. The law thus declared was of course the law of the state, but the way in which it was decided, the weight given by the court to the decisions of courts, and especially of federal courts, in other states, led lawyers to apply the name of 'federal common law' to the doctrine.

This phrase 'the Federal Common Law' leads to a natural assumption that there is a law of the United States parallel to the law of the states and administered by the United States courts. This common law is supposed to be a law of the United States on almost

every point which is administered by the federal courts. This led to a curious controversy both of courts and of periodicals as to the possibility of such a law. After the controversy had subsided legal thought went on as usual and the Supreme Court of the United States decided that there was no such thing as a law of the nation apart from the laws of the states."

Since Swift v. Tyson has not been definitely overruled, it is impossible to find decisions in lower courts which directly criticize it. They merely avoid it in many cases. The real criticism is to be found in some of the dissenting opinions to decisions of this Court. One of these is found in the case of

Black & White Taxicab and Transfer Company v. Brown & Yellow Taxicab and Transfer Company 276 U. S. 518 (1928)

In this case a Taxicab Company had a contract with the Railroad Company giving the Taxicab Company the exclusive rights to serve a particular station. The question was whether this contract was enforceable. Under the law of the State of Kentucky, where the station was, the contract would have been held invalid. This Court held that the question of the validity of the contract

was a matter of general law and disregarded the state decisions. Justice HOLMES filed a dissenting opinion in which Justices BRANDEIS and STONE joined.

The fallacy back of Swift v. Tyson was discussed in the following language, at page 533:

> "If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is. The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law.
>
> * * *
>
> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that

there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

and at page 534:

"If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. * * * I see no reason why it should have less effect when it speaks by its other voice. * * * If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain."

and at page 535:

> "Mr. Justice STORY in *Swift v. Tyson,* 16 Peters, 1, evidently under the tacit domination of the fallacy to which I have referred, devotes some energy to showing that Sec. 34 of the Judiciary Act of 1789, c. 20, refers only to statutes when it provides that except as excepted the laws of the several States shall be regarded as rules of decision in trials at common law in Courts of the United States. An examination of the original document by a most competent hand has shown that Mr. Justice STORY probably was wrong if anyone is interested to inquire what the framers of the instrument meant. 37 Harvard Law Review, 49, at pp. 81-88.
>
> * * *
>
> "I should leave Swift v. Tyson undisturbed, as I indicated in Kuhn v. Fairmount Coal Co., but I would not allow it to spread the assumed dominion into new fields."

The suggestion of Justice HOLMES of limiting Swift v. Tyson has been adopted by many cases, and the rule has grown up that while the federal courts are not bound by state decisions upon matters of general law they will give weight to them in order to avoid conflict as far as possible.

This rule is stated in

25 Corpus Juris, Page 846, Section 185

as follows:

> "If a question depends upon principles of general jurisprudence, or rests upon general or commercial law, the federal courts will decide for themselves and are not bound by state decisions. But although such courts are not absolutely controlled by state decisions, yet they will give weight thereto if they are called upon to construe the general commercial law of a state upon a new question, and they will also act upon principles of comity, to avoid conflict as far as possible, without sacrificing their own dignity, and in case of doubt may for the sake of harmony lean toward the views of the state court."

A great many cases are cited for the latter proposition. It is impractical to brief all the cases upon the subject. The following are in point and themselves cite many other cases to the same effect:

Sim v. Edenborn, 242 U. S. 131 (1916)

In this case a question of general commercial law came up for decision. The Circuit Court of Appeals for the Second Circuit declined to follow

the decisions of the New York state courts. In reversing this position, Mr. Justice McReynolds discusses the effect to be given to the decision of the state courts, at page 135:

> "This court has many times considered how far federal tribunals, when undertaking to enforce laws of the States, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess v. Seligman,* 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence the former exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' This has been often reaffirmed."

Nine decisions by this Court are cited immediately following this quotation.

Trainor Co. v. Aetna Casualty & Surety Co. 290 U. S. 47 (1933)

In this case the holder of a mortgage took a bond to assure the completion of a building upon the mortgaged premises. The building was not erected and the question was the measure of damages against the bonding company. The courts of

Pennsylvania have stated that under such circumstances the measure of damages is the cost of the building, notwithstanding the mortgage was adequately secured without the building. The trial court refused to follow this rule and allowed nominal damages only. The decision was affirmed by the Circuit Court of Appeals for the Third Circuit. This Court reversed the decision and held that the decisions of the Supreme Court of Pennsylvania should be followed. In limiting the rule of Swift v. Tyson, Mr. Justice SUTHERLAND states as follows at pages 54-55:

> "The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt.' *Burgess v. Seligman*, 107 U. S. 20, 33-34. And see *Sim v. Edenborn*,

242 U. S. 131, 135, where the authorities are collected; *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is 'balanced with doubt,' for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right.''

As shown by the footnote to the citation from Corpus Juris a very great many cases could be cited to the same effect.

Turning to the case at bar we find the rule in Pennsylvania settled by decisions of long standing. The federal rule, it is contended by appellant should be different. The federal cases are in accordance with the decisions of the courts of Pennsylvania.

It is submitted, therefore, that whether or not Swift v. Tyson is still in effect the decision below was correct and the petition should be dismissed.

5. SOME OF THE CASES CITED IN THE PETITION ARE NOT IN POINT

As already pointed out in the introduction the case of *In re Schults,* 132 Fed. 572 (D. C. N. Y.) is cited on page 13 of the petition followed by the bracket: "(involving precisely the same question here under consideration)." The bank in the Schults case was a private bank and was being liquidated in bankruptcy within the state of New York. The decision relies on New York decisions. The liquidation of a national bank was not involved.

On page 10 the petitioner cites the case of *First National Bank of San Jose v. California,* 262 U. S. 366. In this case the state of California filed a proceeding against a national bank requiring that a deposit inactive upon the books of the bank for more than twenty years be escheated to the state of California under a state statute providing for such procedure. The state courts sustained the action and on a writ of error to the judgment of the Supreme Court of California, the decision was reversed on the ground that the state legislature could not pass an act abrogating the deposit con-

tract in a national bank. The case stands simply for the point that a state legislature cannot provide for the escheat of a deposit in a national bank. This is a question of operation, not of liquidation.

Again on page 10 the petition cites *First National Bank v. Selden,* 120 Fed. 212 (C. C. A. 7).

In this case Selden was the receiver of a closed national bank which had on deposit a sum of money with the First National Bank of Chicago. Before closing the insolvent bank had drawn checks against this deposit fund sufficient to exhaust it. Under the law of Illinois, the drawing of checks against the fund is an assignment pro tanto of the deposit. Under the federal cases, this is not so. The receiver of the closed bank brought an action to recover the deposit whereupon the First National Bank of Chicago filed a bill in equity to enjoin the suit. The bill was dismissed on the ground that in the case of this irreconcilable conflict between the federal and state decisions, the federal authorities would prevail. In the case at bar this conflict is not present.

On page 11 the petitioner cites *McCandless v. Dyar,* 34 Fed. 2d, 989 (1928) D. C. S. D., South Dakota. In this case a national bank issued certificates of deposit which were guaranteed by the defendant and five others. After the bank suspended the defendant was obliged to pay out on his guaranty and took up the certificates. At the

time of the endorsement the defendant was indebted to the bank. The receiver of the bank brought an action on this indebtedness and the defendant sought to offset the amount he had paid under his endorsement. The offset was denied on the theory that, while the endorsement of guaranty was made prior to the closing of the bank, there was no debt owing from the bank to the defendant until afterwards when the defendant was obliged to pay on account of his endorsement. Therefore, the set-off was not allowed. The case did not involve the point under consideration in the case at bar.

The authorities cited in the petition do not support its contention and it is submitted that the petition should be dismissed.

Respectfully submitted,

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No. 36 October Term, 1937

In the

Supreme Court of the United States

JOSEPH K. WILLING, Receiver of Commercial National Bank, Philadelphia, Pennsylvania

Petitioner

vs.

ISRAEL BINENSTOCK, individually, and as surviving partner of the partnership firm of SWINGER AND BINENSTOCK, and BESSIE SWINGER, individually, and as executrix of the Estate of Benjamin Swinger, deceased.

Respondents

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

I. OPINIONS BELOW

The opinion of the District Court (KIRKPATRICK, *J.*) appears at pages 8-11 of the record and is reported in 18 Fed. Supp. 262.

The affirming opinion of the Circuit Court of Appeals for the Third Circuit appears at pages 18-19 of the record and is reported in 88 F (2d) 474.

II. JURISDICTION

This Court granted a writ of *certiorari* to the Circuit Court of Appeals for the Third Circuit.

III. STATEMENT OF THE CASE

Petitioner's statement of the case is correct except that it refers (p. 3) to three of the notes as "joint notes." They were partnership notes signed "Swinger & Binenstock" (R. 5). The word

"joint" has had and still has numerous meanings by implication of law. The question in this case is whether notes signed "Swinger & Binenstock" may be set off against the individual deposits of Swinger and Binenstock. The result should not be assumed in advance by the use of the equivocal word "joint."

IV. SUMMARY OF ARGUMENT

Respondents contend that under the law of Pennsylvania the individual deposits of the partners in the firm of Swinger and Binenstock would be set-off against the firm indebtedness on the notes. The National Banking Act does not cover the subject, but provides generally for "ratable distribution" of the assets of an insolvent national bank. The rights of depositors are, therefore, matters of local law. However, even if the Court should consider that a separate body of federal decision law should be built up on this subject, it should be in accord with the Pennsylvania rule and the set-off should be allowed. Quite a number of decisions in the federal courts incline that way and the latest decision in the First Circuit defi-

nitely so holds with respect to a joint obligation. The fact that national banks are liquidated by a central authority managed from Washington should not be allowed to overshadow the larger fact that depositors do not get their rights from Washington. These rights arise by reason of local law. These laws sometimes vary according to the locality. The local law, however, should not be abolished merely to make liquidation easy.

The modern idea of a joint obligation is quite different from the original conception. At one time it was the law that all persons on a joint obligation had to be sued and served with process at once. Ordinary ideas of justice today have generally made it possible to sue anyone of several joint obligors on a joint obligation and proceed against each severally. In Pennsylvania this is provided for by statute. Only the individual intended to be held needs to be served and the judgment is against him alone. There is, therefore, no substantial difference between a joint and a joint and several obligation.

Lastly it is in accord with the ordinary requirements of fairness that the set-off should be allowed. No technical rule nor remnants of any ancient doctrine should be allowed to stand in the way of this fair result.

V. ARGUMENT

1. INTRODUCTION

Much of Petitioner's brief is not open to dispute. The Respondents do not contend that Congress, if it chooses, may not provide by statute when set-off shall be allowed in liquidating a national bank. The Respondents' position is that Congress has not done so. The pertinent statute* provides only that there shall be a "ratable dividend." Who may be a creditor and to what extent is not covered at all. To extend in the statute the provisions necessary for such a determination would require a re-statement of a large body of law. The determination of who are creditors and to what extent depends on the law of the locality. Many facts may be conceived which would establish a creditor position in one state and not in another. There can no more be uniformity upon

*Section 5236 U.S.R.S. (U. S. C. Title 12 Sec. 194); Petitioner's Brief, p. 43.

this subject than upon many others. There might be uniformity upon the single subject of set-off if all the states' legislatures so required. They have not done so and there are differences of result in different states.

Congress might have provided by statute the liabilities of the partners on a note signed in the partnership name, but it has not done so. While it is true the uniform partnership act in force in Pennsylvania provides that the liabilities of partners shall be joint, neither the partnership act nor Congress have defined the nature of joint liability. That is left to the general law of the respective states. As will be shown below, there is really no difference in Pennsylvania between a joint and a joint and several obligation.

Congress might also have required uniformity upon the question of set-off in the liquidation of national banks but it has not done so. Consequently, there may be lack of uniformity but that lack has not yet appeared. All the cases on the subject in the liquidation of national banks arrive at the same result upon the point involved in this case.

At page 21 of his brief, Petitioner cites a case from Indiana and urges the adoption of the Indiana rule as the correct one. There is no reason why it should not be the rule in Indiana. But an Indiana case goes no further to establish a uni-

form federal rule than do the Pennsylvania cases which reach an opposite result.

As will be shown below the decisions of the federal courts are in accord with the decision of both courts below in this case. But if this were not so, it might well be questioned whether there should be a general uniform rule to establish the right of set-off in national bank liquidations. Banks are not created to be liquidated and there is no reason why the convenience of the Comptroller of Currency should for no other reason than his convenience prevail over other considerations. The organization of national banks necessarily should be uniform because the right to operate is derived from a single source. But the property rights and contractual considerations which determine who shall be a creditor and to what extent originate in local law. If local law is not recognized, two banks, side by side will liquidate in different ways. Local uniformity rather than national uniformity is desirable in such a case.

Realizing that local law is the primary origin of creditor rights against a national bank Congress has not attempted to replace that law with a whole body of law applicable only to national banks. Even the provision for a "ratable dividend" is not peculiar to the liquidation of national banks. Those words merely announce a generally accepted principle of fairness.

2. THERE IS NO PRACTICAL DISTINCTION IN PENNSYLVANIA BETWEEN A JOINT OBLIGATION AND A JOINT AND SEVERAL OBLIGATION

The Act of the Pennsylvania legislature, 1915 P.L. 18 Section 15; 59 PS Section 37 provides as follows:

> "All partners are liable—
>
> (a) Jointly and severally, for everything chargeable to the partnership under sections thirteen and fourteen.
>
> (b) Jointly, for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."

Section (b) above referred to covers ordinary partnership debts. This act, however, does not provide what the nature of joint liability is. Joint liability has been the subject of considerable legislation in Pennsylvania just as it has in most other states.

Originally a joint obligation was subject to more or less arbitrary rules. For instance all of the joint debtors had to be sued at once, or else those not sued were released. Indeed at an early date, it was necessary to sue all the parties and get

service upon them unless any absent were outlawed. There was also the rule that the release of one joint obligor released all of them. All of these rules were very cumbersome and they have all been changed by statute in Pennsylvania. The Act of 1830 P. L. 277 Section 1; 12 PS Section 801 (Appendix p. 42) makes it possible in Pennsylvania to sue any joint obligor without making service upon any of his co-obligors. This may be done without showing that the others could not be served. In other words a plaintiff may sue joint obligors separately. As a matter of common practice the others are ordinarily named in the caption of the case, but those not served are not bound and separate suits may be brought against the others at a later date. While the statute referred to is somewhat ambiguous in that it refers to actions against "joint and several obligors, co-partners * * * " it was early decided, however, that the act does apply to joint obligations.

Miller v. Reed, 27 Pa. 244 (1856)

Without going into the facts of this case, it is sufficient to note that if the obligation were joint the defense presented would be good, whereas if there were no difference between a joint and several note the defense would not be good. The court held that in Pennsylvania there was no longer any real difference between a joint and a

joint and several obligation. At page 248, Justice WOODWARD of the Supreme Court of Pennsylvania stated:

> "The terms of this legislation, though limited to undertakings that are 'joint and several', are applicable to contracts that are joint and not several: 6 Wh. 268; 5 Barr 401. If then, neither an action and recovery against one joint debtor, nor a confession of judgment by one, nor the death of one after judgment, works a discharge of the other, what difference remains, so far as regards the remedy, between joint contracts and contracts joint and several? The distinction always had regard to remedies. The parties are bound according to the tenor of the instrument to which they put their signatures, and it is evidence against each of them; but the discharge of one by taking action against the other is the peculiarity which the statutes have taken away."

Section 2 of the Act of 1830 above referred to (Appendix p. 42) provides that one or more of several obligors may confess judgment and this will not bar recovery against the others. The Act of 1848 P. L. 536 Section 3; 12 PS 805 provides that where a judgment is obtained against two or more partners or joint obligors, the death of one of them shall not discharge his estate. The Act of

1848 P. L. 536 Section 5; 12 PS Section 806 (Appendix p. 43) provides that where a judgment is secured against one or more of several partners or joint obligors, such action shall not be a bar to a recovery in a subsequent suit against other obligors who may not have been joined in the suit. The Act of 1877 P. L. 52 Section 1; 12 PS Section 807 (Appendix p. 44) is to the same effect where judgment is secured by default.

The Act of 1862 P. L. 167 Section 1; 59 PS Section 131 together with Section 5 of the same Act 59 PS Section 135 (Appendix pp. 44-5) provide that a creditor may make a compromise with one of several joint debtors or partners and that such a compromise shall not discharge the others.

The Act of 1923 P. L. 981; 12 PS Section 685 (Appendix p. 45) provides that an action started against joint defendants may be changed to an action against less than all of the defendants.

All of these statutes taken together remove every distinction which ever existed between a joint obligation and a joint and several obligation.

In drafting the uniform partnership act the Commissioners appreciated the fact that in some jurisdictions there was no difference between a joint and a joint and several obligation. They inserted the following Commissioners' note after Section 15 of the Uniform Partnership Act which is the section referred to above. This note reads in part as follows:

"In many of these states, however, the results of joint liability as known to the common law have been modified by statute and decision. The extent of the modification varies."

* * *

"The purpose of the statutes in those states which have made the liability joint and several was to effect certain procedural results, rather than to affect the substantive law. Where, therefore, a state has already declared the liability to be joint and several, then the principle of uniformity would not be affected by that state so altering this paragraph as to make the liability joint and several, as this change would affect only the procedural law and this act is one to make uniform the substantive law of partnership."

The Pennsylvania statutes above referred to have not been repealed but are still in force and effect.

Even if there were no such state statutes the difference between a joint and a joint and several obligation has been purely one of procedure except in so far as acts in the nature of a release were indulged in.

1 Williston on Contracts, Sec. 316

"The idea (of a joint obligation) ceases to be practical when a judgment has been ren-

dered against joint contractors and the plaintiff wishes to satisfy that judgment."

It is submitted that to have all this litigation over the question of set-off is unnecessary in the case of an obligation arising under the laws of the Commonwealth of Pennsylvania. The brief of the Petitioner would seem to admit by very clear inference that if the liability of the partners constituting the firm of Swinger and Binenstock on the notes here in question were both joint and several, the set-off requested would surely be allowed. There cannot be any doubt of this point. The whole argument is based on the assumption that the liability of the partners is joint and not several. As a matter of fact the entire argument simply turns upon an assumed definition of the word "joint." In Pennsylvania a joint obligation most assuredly possesses all the aspects of a joint and several obligation and there is no difference whatever between the two. It is further submitted that since Congress has not set up a body of commercial law relating to national banks (assuming that it could do so) this Court should not impose upon the parties a relationship which did not in fact or in law exist based purely upon some definition of the word "joint" maintaining in Indiana or some other jurisdiction. The fact that the laws of the states may not be uniform in the definition

of the word "joint" as applied to obligations is a circumstance which cannot be escaped. There are many points of law upon which the states have adopted different rules. The tendency, however, is very clearly away from the dangers inherent in the old common law rules applicable to joint obligations.

The importance of considering the Pennsylvania rule as between clients doing business entirely in Pennsylvania is very practical. In Pennsylvania a bank can lend to an utterly irresponsible partnership, provided it be assured of the responsibility of only one of the partners. The partnership firm of Swinger and Binenstock was not irresponsible but the partnership notes were not secured at the bank by partnership assets. The bank, however, would certainly consider the notes perfectly secured, because all the time the bank had on deposit moneys in the name of one of the partners in sufficient amount to more than pay all the partnership obligations. As a practical matter, it is a fact that the bank was secured by the individual deposits of the partners. Conversely, it is just as true that the partners never for a moment considered that they were straining relations with the bank in asking for loans upon the notes. They knew that they had more than sufficient security and that this security could be reached by the bank

even though it stood in the name principally of one of the partners.

It follows that as a matter of practical fact both the bank and the partners as well as the partnership firm considered that the possibility of offset furnished security to the bank and risk to the individual deposits. It would be a most extraordinary thing if this Court should say that the thing which all these business people must have assumed cannot be so when the action raising the question is brought in the federal courts after the bank has failed.

A brief discussion of the cases, both federal and state on the general question of set-off follows:

3. UNDER THE FEDERAL CASES THE SET-OFF SHOULD BE ALLOWED

The bill of complaint is filed to take advantage of the rule recognized in the federal courts as well as in the Pennsylvania courts that equitable set-off will be allowed under the circumstances recited because, the bank being insolvent, it would deprive the plaintiffs of a remedy they had before the failure, not to allow the set-off.

The theory is that while the obligation of the partnership to the bank is a joint obligation, liability therefor is both joint and several. In other words, if the bank sues the partnership it may secure a joint judgment, but at that point the lack of mutuality, if any exists, ceases. The partners are individually liable each for the entire amount of the partnership indebtedness in execution upon the judgment against the firm. They may even be sued separately. Therefore, as a matter of fact, the individual partners are liable severally to the bank on the partnership obligation. Under these circumstances, it would be inequitable to allow the bank to enforce its claims and not allow the set-off. This follows entirely apart from the Pennsylvania statutes affecting joint obligations.

1 Williston on Contracts, Sec. 316

> "The idea (of a joint obligation) ceases to be practical when a judgment has been rendered against joint contractors and the plaintiff wishes to satisfy that judgment."

Therefore, if the bank brought an action against the firm on these notes, it could claim in execution the assets of the individual partners. Suppose then the individual partners should bring suit against the bank for their individual deposits and secure judgments. The case would then be one

of complete and perfect mutuality. The individual partners could then come into equity and demand an offset of the claims. The only reason this procedure cannot take place at law is by reason of the insolvency of the bank making it impossible for the individual depositors to bring suit to recover their deposits. It is inequitable that the bank should be permitted to secure rights which it would not otherwise possess by reason of its own insolvency and consequent default.

The cases generally allow an equitable set-off at the outset under these circumstances where one of the debtors is either insolvent or a non-resident.

The precise case has arisen in the First Circuit and the equitable set-off has been allowed. This is the only case in the federal courts directly in point.

Roelker v. Bromley-Shepard Co., Inc. et al
73 Fed. 2d, 618 (1934) C.C.A. 1

Certiorari denied, 294 U. S. 713

In this case a corporation and an individual were obligated to a national bank on a joint note. When the bank closed both the corporation and the individual had deposits at the bank in excess of the note. A bill in equity was brought to compel the offset. First, a motion to dismiss was filed and overruled. The case went to trial on an agreed statement of facts, and a final decree was entered

allowing the offset. This decree was appealed by the receiver of the bank to the Circuit Court of Appeals for the First Circuit and the decision was affirmed.

All of the arguments here advanced by the petitioner were advanced in that case. Reference was first made to the provisions of the National Banking Act (12 U. S. C. A. Sec. 194) which require a ratable distribution of the bank's assets among its creditors. It was contended that this precluded the possibility of set-off. This argument, many years ago, was rejected by this Court in a case which will be referred to below. In the Bromley-Shepard case the Circuit Court of Appeals for the First Circuit states, at page 619:

> "We do not think Congress intended by the National Bank Act to deprive depositors of the right of equitable set-off when justice requires it. The language of the court in Scott v. Armstrong, *supra,* in discussing this statute, is applicable to the situation here:"

Upon the merits, the same court stated:

> "(2) Conceding that at law, and generally in equity, a claim of one of two joint obligors cannot be set off against the joint debt, it is well established that, where justice requires, and there is no adequate remedy at law, a court of equity under such circumstances will

order a set-off, and a bill in equity to compel such set-off is a proper form of remedy."

* * *

"(4) Under the circumstances of this case, we think that justice requires that so much of the deposit of the Bromley-Shepard Company, Inc., in the insolvent bank as was necessary to pay the joint note, should be set off against the corporate note of the Bromley-Shepard Company, Inc., though the note was also signed by the treasurer of the corporation as a comaker."

This Court denied a petition for certiorari (294 U. S. 713). The only change in the authorities since then is the decision of the case at bar in accord.

Scott v. Armstrong, 146 U. S. 499 (1892)

In this case a national bank became insolvent and its assets were taken over by a receiver. Upon the date of the insolvency it held a note against a depositor who had a deposit at the bank. Because the note was not due at the date of insolvency, it was contended that the set-off should not be allowed and that in any event set-off was not allowable under the provision of the National Banking Act providing for a ratable distribution of the assets of a closed bank. Chief Justice FULLER, in

an opinion allowing the set-off, dealt with this argument at page 510:

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

and at page 511:

> "We are dealing in this case with an equitable set-off, but if on June 20 the note had matured and each party had a cause of action capable of enforcement by suit at once, upon the argument for the receiver the legal set-off would be destroyed just as effectually as it is contended the equitable set-off is. We cannot believe Congress intended such a result, or to destroy by implication any right vested at the time of the suspension of a national bank."

The question of allowing a joint claim to be set off against the separate claims of the joint debtors had been previously dealt with by way of dictum by this Court.

Gray v. Rollo, 18 Wallace, 629 (1873)

In this case the facts were as follows: The insolvent claimant was a fire insurance company. It held notes on which Moses Gray and one Gaylord were jointly liable. It owed money upon a fire loss, not to Moses Gray individually, but to a partnership consisting of Moses Gray and his brother Franklin Gray. Moses Gray attempted by a bill in equity to compel the insurance company to set off the amount due on the policies to Gray Brothers against the joint obligation of himself and Gaylord. He alleged in his bill that his brother Franklin assented to and authorized the appropriation of half of the amount due on the policies to the extinguishment of his liability upon his joint note to Gaylord, but this Court apparently considered that this allegation was unimportant. This Court distinguished from the facts before it a number of other cases, among them, *Tucker v. Oxley,* 5 Cranch, 34. At page 634, in the opinion in Gray v. Rollo, Justice BRADLEY says:

> "But the case of Tucker v. Oxley will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt,

but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which the bankrupt had against Tucker."

It is clear that under the federal decisions the set-off should be allowed.

4. UNDER THE PENNSYLVANIA DECISIONS THE SET-OFF WOULD BE ALLOWED

The district judge stated (R. 9):

"The law of the State of Pennsylvania if applicable would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. *Stewart v. Coulter,* 12 S. & R.

252; *Cochran v. Cutter,* 18 Pa. Sup. Ct. 282. See also *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477."

Childerston, et al v. Hammon, 9 S. & R. 68 (1822)

In this case an action was brought, upon a single bill, against two defendants jointly. The defendants proved that the plaintiff did not own the action but that it was owned by a third party, named John Hammon, and that the action was being brought for his benefit. The defendants further proved that John Hammon was indebted to one of the defendants in a sum greater than the amount due upon the single bill. The trial court rejected this evidence. This decision was reversed and a new venire ordered upon the theory that if these facts were true the set off should be allowed.

Stewart v. Coulter, 12 S. & R. 252 (1825)

In this case an action was brought upon a claim by Stewart against two joint defendants, Coulter and Day. The trial court allowed as an offset a claim by Coulter alone against Stewart. The action was brought in the Supreme Court sitting at *nisi prius.* Upon motion for a new trial the trial judge stated, at page 253:

"At the trial, my opinion was, that the indebtedness of the plaintiff to one defendant

was, of itself, unless there was some superior equity in a third person, a subject of set-off by that defendant, although he had been sued with others, and might be set off on the trial under our act of assembly, which has been always considered as more comprehensive than the British statutes of 2 Geo. II, Ch. 22, and 8 Geo. II, Ch. 24. That opinion has not been changed, and is unchangeable; for if the very able arguments of the counsel of the plaintiffs could not change it, it cannot be shaken."

Justice GIBSON filed a separate opinion in which he states as follows:

"For myself, I cannot admit that this set-off could be claimed at law, or that there is in this respect any material difference between our act of assembly and the Stat. 2 Geo. II, Ch. 22. But whatever difference does exist, is against the set-off, our act having regard to cases where a balance may be recovered by the defendant, and it cannot be said that partners may recover a debt separately due to one of them. But I throw this out only as my own opinion, and as we all agree that the debt due by Stewart to Coulter was a proper subject for equitable defalcation, I shall rest the opinion of the court on that ground alone."

Cochran v. Cutter, 18 Pa. Super. Ct. 282 (1901)

In this case the surviving partner of a firm composed of two persons engaged the plaintiff, one of their customers who was indebted to them, to work for a new firm formed to carry on the business after the death of his co-partner. The persons constituting the new firm were the surviving partner, the widow and the sole heir of the deceased partner. The question was whether they could set off the plaintiff's debt to the old firm against his claim against the new firm. At page 284 Judge RICE says:

> "Accordingly it has been held repeatedly in Pennsylvania although the rule seems to be different in some of the other states of the Union, that two or more defendants jointly sued may set off a debt owing by the plaintiff to one of them:"

The foregoing three cases were cited by the Supreme Court of Pennsylvania in the case of *Mintz v. Tri-County Natural Gas Company,* 259 Pa. 477 (1918) at page 482. They were distinguished but in no manner criticized and it may, therefore, be taken that they still represented the views of the Supreme Court of Pennsylvania. There are no later cases.

5. THE FEDERAL COURTS WILL GIVE WEIGHT TO STATE COURT DECISIONS IN DECIDING A QUESTION OF GENERAL LAW

The 34th Section of the Judiciary Act of 1789 provides:

> "That the laws of the several States, except where the constitution, treaties or statutes of the United States shall otherwise require or provide shall be regarded as rules of decision in trials at common law, in the Courts of the United States, in cases where they apply."

In the early case of

Swift v. Tyson, 41 U. S. 1 (1842)

this Court announced the doctrine that this section of the Judiciary Act applies only to the statutes of the States as construed by their courts and to purely local matters, such as the title to real estate and that the so-called common law or decision law of the States on matters of general law is not binding upon the federal courts.

This case has been the subject of an enormous amount of controversy and it is now generally

recognized that the decision was probably wrong. It has never been overruled, is still sometimes cited, and very frequently distinguished.

There is an article of some 83 pages in length in

37 Harvard Law Review, 49

This article refers to the original documents to which Justice STORY, who wrote the opinion in Swift v. Tyson, did not have access, and shows that if he had known the facts back of the drafting of Section 34 his decision would have been otherwise. The article states, at page 52:

> "Had Judge STORY seen this original draft of the amendment, it is almost certain that his decision would have been the reverse of what it was."

and at page 85:

> "It now appears from an examination of the Senate Files, however, that if Judge STORY and the Court had had recourse to those Files in preparing the decision in Swift v. Tyson, it is highly probable that the decision would have been different, and that the word 'laws' in Section 34 would have been construed to include the common law of a State as well as the statute law. This conclusion will probably be reached by anyone who examines the original slip of paper on which

the amendment containing Section 34 was written, and which is, with little doubt, in Ellsworth's handwriting."

Professor Beale, in his new book

The Conflict of Laws, Vol. 1, page 25, section 3.5 (1935)

says, concerning the decision in Swift v. Tyson, at page 26:

"This decision, unfortunate in that it unsettled the minds of lawyers as to the law and thus made it difficult to advise clients, was nevertheless quite within the right of the court; the federal court in the state was given by the Constitution of the United States as full power to declare the law, as the state court. The law thus declared was of course the law of the state, but the way in which it was decided, the weight given by the court to the decisions of courts, and especially of federal courts, in other states, led lawyers to apply the name of 'federal common law' to the doctrine.

This phrase 'the Federal Common Law' leads to a natural assumption that there is a law of the United States parallel to the law of the states and administered by the United States courts. This common law is supposed to be a law of the United States on almost

every point which is administered by the federal courts. This led to a curious controversy both of courts and of periodicals as to the possibility of such a law. After the controversy had subsided legal thought went on as usual and the Supreme Court of the United States decided that there was no such thing as a law of the nation apart from the laws of the states."

Since Swift v. Tyson has not been definitely overruled, it is impossible to find decisions in lower courts which directly criticize it. They merely avoid it in many cases. The real criticism is to be found in some of the dissenting opinions to decisions of this Court. One of these is found in the case of

Black & White Taxicab and Transfer Company v. Brown & Yellow Taxicab and Transfer Company 276 U. S. 518 (1928)

In this case a Taxicab Company had a contract with the Railroad Company giving the Taxicab Company the exclusive right to serve a particular station. The question was whether this contract was enforceable. Under the law of the State of Kentucky, where the station was, the contract would have been held invalid. This Court held that the question of the validity of the contract

was a matter of general law and disregarded the state decisions. Justice HOLMES filed a dissenting opinion in which Justices BRANDEIS and STONE joined.

The fallacy back of Swift v. Tyson was discussed in the following language, at page 533:

> "If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct. Therefore I think it proper to state what I think the fallacy is. The often repeated proposition of this and the lower Courts is that the parties are entitled to an independent judgment on matters of general law.
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> * * *
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> It is very hard to resist the impression that there is one august corpus, to understand which clearly is the only task of any Court concerned. If there were such a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that

there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else."

and at page 534:

"If within the limits of the Constitution a State should declare one of the disputed rules of general law by statute there would be no doubt of the duty of all Courts to bow, whatever their private opinions might be. * * * I see no reason why it should have less effect when it speaks by its other voice. * * * If a state constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain."

and at page 535:

> "Mr. Justice STORY in *Swift v. Tyson,* 16 Peters, 1, evidently under the tacit domination of the fallacy to which I have referred, devotes some energy to showing that Sec. 34 of the Judiciary Act of 1789, c. 20, refers only to statutes when it provides that except as excepted the laws of the several States shall be regarded as rules of decision in trials at common law in Courts of the United States. An examination of the original document by a most competent hand has shown that Mr. Justice STORY probably was wrong if anyone is interested to inquire what the framers of the instrument meant. 37 Harvard Law Review, 49, at pp. 81-88.
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> * * *
>
> "I should leave Swift v. Tyson undisturbed, as I indicated in Kuhn v. Fairmont Coal Co., but I would not allow it to spread the assumed dominion into new fields."

The suggestion of Justice HOLMES of limiting Swift v. Tyson has been adopted by many cases, and the rule has grown up that while the federal courts are not bound by state decisions upon matters of general law they will give weight to them in order to avoid conflict as far as possible.

This rule is stated in

25 Corpus Juris, Page 846, Section 185

as follows:

> "If a question depends upon principles of general jurisprudence, or rests upon general or commercial law, the federal courts will decide for themselves and are not bound by state decisions. But although such courts are not absolutely controlled by state decisions, yet they will give weight thereto if they are called upon to construe the general commercial law of a state upon a new question, and they will also act upon principles of comity, to avoid conflict as far as possible, without sacrificing their own dignity, and in case of doubt may for the sake of harmony lean toward the views of the state court."

A great many cases are cited for the latter proposition. It is impractical to brief all the cases upon the subject. The following are in point and themselves cite many other cases to the same effect:

Sim v. Edenborn, 242 U. S. 131 (1916)

In this case a question of general commercial law came up for decision. The Circuit Court of Appeals for the Second Circuit declined to follow

the decisions of the New York state courts. In reversing this position, Mr. Justice McReynolds discusses the effect to be given to the decision of the state courts, at page 135:

> "This court has many times considered how far federal tribunals, when undertaking to enforce laws of the States, should follow opinions of their courts. The authorities were reviewed, and rule announced in *Burgess v. Seligman,* 107 U. S. 20, 33, 34, 35, which declared that, as to doctrines of commercial law and general jurisprudence the former exercise their own judgment, 'But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt.' This has been often reaffirmed."

Nine decisions by this Court are cited immediately following this quotation.

Trainor Co. v. Aetna Casualty & Surety Co. 290 U. S. 47 (1933)

In this case the holder of a mortgage took a bond to assure the completion of a building upon the mortgaged premises. The building was not erected and the question was the measure of damages against the bonding company. The courts of

Pennsylvania have stated that under such circumstances the measure of damages is the cost of the building, notwithstanding the mortgage was adequately secured without the building. The trial court refused to follow this rule and allowed nominal damages only. The decision was affirmed by the Circuit Court of Appeals for the Third Circuit. This Court reversed the decision and held that the decisions of the Supreme Court of Pennsylvania should be followed. In limiting the rule of Swift v. Tyson, Mr. Justice SUTHERLAND states as follows at pages 54-55:

> "The circuit court of appeals held that the Pennsylvania decisions merely declared the common law of that state with regard to suretyship, and, since that law is derived from the principles of general jurisprudence common to all the states, a federal court in determining what it is might exercise an independent judgment. We do not deem it necessary to discuss the principle enunciated or to decide whether the Pennsylvania decisions come within it. It is enough to say that even where the principle applies, 'for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt.' *Burgess v. Seligman*, 107 U. S. 20, 33-34. And see *Sim v. Edenborn*,

242 U. S. 131, 135, where the authorities are collected; *Community Bldg. Co. v. Maryland Casualty Co.*, 8 F. (2d) 678, 680. In the present case it would not be going far enough to say merely that the question is 'balanced with doubt,' for it seems to us that the Pennsylvania decisions, and those of the other states cited above, are plainly right."

As shown by the footnote to the citation from Corpus Juris a very great many cases could be cited to the same effect.

Turning to the case at bar we find the rule in Pennsylvania settled by decisions of long standing. The federal rule, it is contended by Petitioner should be different. The federal cases are in accordance with the decisions of the courts of Pennsylvania.

It is submitted, therefore, that whether or not Swift v. Tyson is still in effect the decision below was correct and should be affirmed.

6. ALLOWANCE OF THE SET-OFF IS IN ACCORDANCE WITH ORDINARY FAIRNESS

It has already been shown in this brief that if the bank had desired to recover upon the partnership notes, it could have sued either of the partners or both of them. In this way it could immediately have secured satisfaction out of the deposits of each of the individual partners or out of any other assets the individual partners might have owned. In Pennsylvania the result is no different than if the partners had signed the notes jointly and severally. After insolvency the Comptroller has taken the position that the partnership notes are joint notes and that a joint obligation is substantially different from a joint and several obligation. Therefore the Comptroller contends that there is no mutuality. In other words the obligation of the bank to the partners is not the same as that of the partners to the bank. There is no other answer to this proposition than that it is simply not the law of Pennsylvania. The question of whether a federal court of equity would allow this offset in a jurisdiction where a joint obligation is still a thing peculiar unto itself, really does not enter into this case at all. The real

question is whether there is any such thing as a joint obligation in Pennsylvania as distinguished from a joint and several obligation. The Petitioner's brief does not touch this point. Indeed the point is not arguable.

The substantial rights between the bank and its depositors and the partnership firm arise entirely out of the law of Pennsylvania. Whether or not Congress could have passed a partnership act applicable to those who deal with a national bank and whether or not Congress could have passed a statute prescribing the rights and remedies of persons whose names appear upon negotiable instruments deposited in a national bank is entirely beside the point. The mere fact that Congress has not passed such laws, coupled with the fact that all of the states do have such laws under which their citizens universally transact business, is sufficient argument to support the contention that the rights of the parties depend on state law and derive their sanction from it. Those rights do not spring from any national law.

In this case the notes were made in Pennsylvania, the bank had its place of business in Pennsylvania and the deposits were made in that state. All of the transactions involved took place in Philadelphia. It is submitted that necessarily the nature of the obligations which arose between the

parties as a result of their acts depends on the law of Pennsylvania.

As has already been shown the law of Pennsylvania is clear that there is no difference between a joint and a joint and several obligation. To say that there is a lack of mutuality is simply to ignore the facts. Whether or not there would be mutuality if the same acts were performed in Indiana or any other state is unimportant. Such acts when performed in Pennsylvania do result in mutuality. Statutes to that effect, already referred to, have been adopted in this Commonwealth.

The question, therefore, does not really arise in this case as to whether the federal court should have the same rule about set-off as has been so many times announced by the courts of Pennsylvania and by those of other states. It may be that in other states where a joint obligation is a peculiar thing the state courts and the federal courts may differ as to whether equity should allow the set-off in the case of insolvency of one of the parties. The foregoing pages of this brief have been devoted to show that the federal courts should allow the set-off even in such a case.

No one has asserted in this case that equity will refuse to allow set-off where there is mutuality. This seems to be an accepted proposition. In this case there was mutuality. Calling the obligation

of the firm a joint obligation is simply attaching a name to it which has one meaning in Indiana but an utterly different meaning in Pennsylvania. Under the meaning attached to this word in Pennsylvania, there is mutuality of obligation and the set-off should be allowed under the ordinary rule.

Any other result will do violence to the rights of both parties under the law of Pennsylvania. If we bear in mind that the bank could have sued either of the partners separately, it becomes clear that the bank would regard itself as amply secured against the partnership indebtedness by reason of the fact that one of the partners had on deposit in the bank a sum of money larger than the total of all the notes. It is an inescapable fact that the bank under the law of Pennsylvania was so secured just as effectively as if the deposit had been in the name of the partnership firm. Conversely, the partnership firm was able to borrow without security at this bank. Indeed one of the loans was made the day the bank failed. Making a loan under these circumstances was purely a matter of form. It was merely a matter of accounting between the partners. Under the law of Pennsylvania they would know that their individual deposits secured the loan made in the name of the firm.

As was stated in the case of *Scott v. Armstrong*, 146 U. S. 499 (1892) "where a set-off is otherwise

valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent."

The foregoing quotation clearly sets forth what each of the partners, or both of them together, and the bank would have said about the status between them on the day the bank closed.

It is submitted that there is no reason why the nature of the obligations between the parties as supported by the law of Pennsylvania should be disturbed because of the insolvency of the bank. The desire of the Comptroller of Currency to have a uniform rule is nothing more than an idle desire. Neither the National Banking Act nor any other act of Congress has said whether there is or is not mutuality under the circumstances of this case. The only law on the subject having any applicability is that of Pennsylvania and that law says there is mutuality and provides statutory procedure for enforcing it.

It would be entirely unfair and do violence to the substantial rights of the parties if this Court should deny set-off on the assumption that there is no mutuality.

Since the law of Pennsylvania has provided all the earmarks of mutuality under the circumstances here involved there is no reason why the

enforcement of those rights should be denied in a federal court of equity.

It is respectfully submitted that the decision below should be affirmed.

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APPENDIX

PENNSYLVANIA STATUTES

Act of 1830 P. L. 277 Section 1; 12 PS Section 801

"In all suits now pending or hereafter brought in any court of record in this commonwealth, against joint and several obligors, co-partners, promisors or the indorsers of promissory notes, in which the writ or process has not been or may not be served on all the defendants, and judgment may be obtained against those served with process, such writ, process, or judgment shall not be a bar to recovery in another suit against the defendant or defendants not served with process."

Act of 1830 P. L. 277 Section 2; 12 PS Section 802

"In all cases of amicable confession of judgment, by one or more of several obligors, co-partners or promisors, or the indorsers of promissory notes, such judgment shall not be a bar to recovery

in such suit or suits as may have to be brought against those who refuse to confess judgment."

Act of 1848 P. L. 536 Section 3; 12 PS Section 805

"Where a judgment shall hereafter be obtained against two or more co-partners, or joint or several obligors, promisors or contractors, the death of one or more of the defendants shall not discharge his or their estate or estates, real or personal, from the payment thereof; but the same shall be payable by his or their executors or administrators, as if the judgment had been several against the deceased alone."

Act of 1848 P. L. 536 Section 5; 12 PS Section 806

"Where a judgment shall be hereafter recovered against one or more of several co-partners, joint or joint and several obligors, promisors or contractors, without any plea in abatement, that all the parties to the instrument or contract on which the suit is founded are not made parties thereto, such judgment shall not be a bar to a recovery in any subsequent suit or suits against any person or persons who might have been joined in the action in which such judgment was obtained, whether the same shall be obtained amicably, or by adversary process."

Act of 1877 P. L. 52 Section 1; 12 PS Section 807

"Where judgment has been or may hereafter be obtained in any court of record of this commonwealth against one or more of several co-defendants, in default of appearance, plea or affidavit of defense, said judgment shall not be a bar to recovery in the same suit against the other defendants jointly, or jointly and severally liable as co-obligors, co-partners or otherwise."

Act of 1862 P. L. 167 Section 1; 59 PS Section 131

"Whenever any co-partnership firm shall be dissolved by mutual consent, or otherwise, it shall and may be lawful for any one or more of the individuals, who was or were embraced in such co-partnership firm, to make a separate composition or compromise with any one or all of the creditors of such co-partnership firm; and such composition or compromise shall be a full and effectual discharge to the debtor or debtors making the same, and to them only, of and from all and every liability to the creditor or creditors with whom the same is made or incurred, by reason of his or their connection with such co-partnership firm, according to the terms of such compromise."

Act of 1862 P. L. 167 Section 5; 59 PS Section 135

"The above provisions in reference to co-partners of a firm shall extend to joint debtors, who are hereby authorized, individually, to compound or compromise for their joint indebtedness, with the like effect in reference to creditors and joint debtors of the individuals so compromising, as is above provided in reference to co-partners."

Act of 1923 P. L. 981 Section 1; 12 PS Section 685

"Whenever it is pleaded in any suit that two or more defendants are jointly liable for the cause of action specified, and, in the opinion of the trial judge, the evidence may not justify a recovery against some of them, the suit shall not be dismissed as to all, but the case shall be submitted to the jury, if the facts are in dispute, to determine which, if any of them, are liable, or, if the facts are not in dispute, the question of liability of any or all of them may be reserved for consideration by the court in banc, or the suit may be dismissed as to some and the trial proceed against the others, in every such contingency, with the same effect as if the defendants ultimately found to be liable were the only ones alleged to be so."

SUPREME COURT OF THE UNITED STATES.

No. 36.—October Term, 1937.

Joseph K. Willing, Receiver of Commercial National Bank, Philadelphia, Pennsylvania, Petitioner,
vs.
Israel Binenstock, Individually and as Surviving Partner of the Partnership Firm of Swinger and Binenstock, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 6, 1937.]

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought by respondents in a federal district court in Pennsylvania seeking to have allowed as a set-off against the indebtedness of the partnership firm of Swinger and Binenstock to the Commercial National Bank the amount of a deposit in the bank by Swinger, now deceased, and so much of a deposit by Binenstock as might be necessary to cancel the indebtedness. The bank was organized under the National Banking Act of the United States, and as such was engaged in business in Pennsylvania. On January 9, 1933, the partnership executed and delivered its promissory note to the bank in the sum of $10,000; and on February 28, 1933, executed and delivered to the bank its further promissory note in the same amount. Under date of January 25, 1933, one Luciano Cammarota executed and delivered to the partnership his promissory note for $300, which note was endorsed and discounted at the bank.

At the close of business on February 28, Swinger had on deposit in the bank the sum of $1,546.58, and Binenstock the sum of $32,323.76. At the same time, the partnership had on deposit the sum of $5,822.52. On that date the bank became insolvent and was taken over by the Comptroller of Currency, who appointed petitioner, Willing, receiver. Petitioner, when the suit was brought, had reduced the indebtedness of the partnership by allowing a set-off of the amount of the partnership deposit, but had failed and refused to allow as a set-off the amounts here in controversy.

Upon these facts the district court sustained the claim of respondents, 18 F. Supp. 262, and entered a decree allowing the set-off of the individual deposits against the joint indebtedness of the partnership, ordering a cancellation and return of the partnership promissory notes, and allowing a claim of Binenstock against the assets of the bank for the amount of his deposit, after making provision for the set-off. The decree also directed petitioner to endorse, without recourse, and deliver to Binenstock, the note of Cammarota for $300. Upon appeal, the court below affirmed. 88 F. (2d) 474. The decrees in both courts were based upon what was understood and declared by them to be the Pennsylvania rule upon the subject.

The case has been elaborately argued upon both sides; but, in respect of the partnership notes, we find it unnecessary to do more than consider and determine the question whether the courts below correctly stated the Pennsylvania law on the subject and were right in following it as the controlling rule of decision.

First. In *Miller* v. *Reed,* 27 Pa. 244, the Supreme Court of Pennsylvania held that, whatever distinctions otherwise would exist between joint contracts and contracts joint and several, these distinctions, under the statutes of the state, had been obliterated. These statutes, it was said (p. 249), "have taken away distinctions that were always embarrassing, and sometimes insuperable obstacles to the course of justice. There was no difference in the duty before, and none in the remedy now. The moral obligation is not affected by the words joint and several, and in Pennsylvania at least, the legal liability is not." It, therefore, makes no difference here whether the Swinger and Binenstock notes were joint, or joint and several.

In the opinion of the federal district court in this case, Judge Kirkpatrick said: "The law of the State of Pennsylvania, if applicable, would clearly sustain the bill. The decisions of that state allow individual claims to be set off in equity against a joint liability even though the party asserting the joint liability is solvent. *Stewart* v. *Coulter,* 12 Serg. & R. (Pa.) 252; *Cochran* v. *Cutter,* 18 Pa. Super. 282. See also *Mintz* v. *Tri-County Natural Gas Company,* 259 Pa. 477." He held the law applicable and entered the decree accordingly. The court below affirmed on the authority of the opinion of the district judge.

Petitioner challenges this view of the district judge, albeit faintly. The judges of both courts below have had wide experi-

ence in the field of Pennsylvania law; and, even if the question were doubtful, as we think it is not, we should have little hesitation in accepting their determination as to the state law on the point here under consideration. We have, however, examined the decisions of the Pennsylvania courts, and fully agree with the courts below as to their interpretation.

Second. We have no occasion to consider whether § 721 of the Revised Statutes (28 U. S. C. § 725) is applicable.* Under *Swift* v. *Tyson* 16 Pet. 1, it would not be. That case has been much criticized, and the tendency of our decisions which have followed has been to limit it somewhat strictly. And one of the practical restrictions upon the principle of that case, which we have many times announced, is that, even where it applies, "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt." *Burgess* v. *Seligman*, 107 U. S. 20, 33-34; *Sim* v. *Edenborn*, 242 U. S. 131, 135, and authorities cited; *Trainor Co.* v. *Aetna Casualty Co.*, 290 U. S. 47, 54-55; *Mutual Life Co.* v. *Johnson*, 293 U. S. 335, 340; *Community Bldg. Co.* v. *Maryland Casualty Co.*, 8 F. (2d) 678, 680. Even if there were a conflict between the decisions of the state and those of the lower federal courts, we should be free to apply the "harmony" rule and follow the state decisions. We are, however, unable to find any such conflict.

The case which seems most nearly in point is *Roelker* v. *Bromley-Shepard Co.*, 73 F. (2d) 618; and that case, so far as it goes, is in harmony with the Pennsylvania rule. There, the company was indebted to the Middlesex National Bank in the sum of $5,000 on a joint note signed by the company and Sarah Bromley Shepard. On the day the bank closed, the company had on deposit in the bank $5,611.10 and Sarah Bromley Shepard had on deposit the sum of $6,275.13. The court ordered that $5,000 of the $5,611.10 due from the bank to the company be set off against the $5,000 due from the company to the bank on the joint note, holding that where justice requires and there is no adequate remedy at law, as was the case there, a court of equity will order a set-off.

* Sec. 721. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

There is nothing in the National Banking Act or in any other federal statute which conflicts with the Pennsylvania rule. In the case of an insolvent bank, the National Banking Act, 12 U. S. C. § 194, simply provides for a "ratable dividend" on all proved or adjudicated claims. This court held in *Scott* v. *Armstrong*, 146 U. S. 499, 510, that the allowance of a valid set-off cannot be considered a preference, and that only the balance, after deduction of the set-off, constitutes part of the assets of the insolvent. "The requirement", the court said, "as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

Third. The reason for the order of the district court requiring the surrender of the Cammarota note for $300 is not clear, but the requirement seems to be erroneous. It does not appear from the record whether Cammarota was solvent or insolvent. If he was solvent, the partnership was not entitled to set off its deposits against its secondary liability as endorser of the Cammarota note. See *Williams* v. *Rose*, 218 Fed. 898, 900; *Bank of United States* v. *Braveman*, 259 N. Y. 65, 68, *et seq.*, and authorities cited. "To allow an indorser", the New York court said, pp. 70-71, "to set off his deposit when the maker is solvent and able to indemnify the indorser as in this case would enable the indorser to collect the full amount unpaid on the note from the maker and at the same time receive a larger amount of his deposit than other depositors. Such a result would be inequitable." An excellent statement in support of the foregoing view, and the reasons for it, will be found in the opinion delivered by Judge Parker in *Shannon* v. *Sutherland*, 74 F. (2d) 530, 531-532.

The facts are not sufficiently disclosed by the record to enable us to dispose of this item. The opinion of neither court deals with the subject, and respondents, neither in their brief nor oral argument, have had anything to say about it. In these circumstances, the case must be remanded to the district court for further consideration of the question, with authority, in its discretion, to take further evidence to that end. With that exception, the decree below is approved.

Reversed and remanded for further proceedings in conformity with this opinion.